



This is a digital copy of a book that was preserved for generations on library shelves before it was carefully scanned by Google as part of a project to make the world's books discoverable online.

It has survived long enough for the copyright to expire and the book to enter the public domain. A public domain book is one that was never subject to copyright or whose legal copyright term has expired. Whether a book is in the public domain may vary country to country. Public domain books are our gateways to the past, representing a wealth of history, culture and knowledge that's often difficult to discover.

Marks, notations and other marginalia present in the original volume will appear in this file - a reminder of this book's long journey from the publisher to a library and finally to you.

Usage guidelines

Google is proud to partner with libraries to digitize public domain materials and make them widely accessible. Public domain books belong to the public and we are merely their custodians. Nevertheless, this work is expensive, so in order to keep providing this resource, we have taken steps to prevent abuse by commercial parties, including placing technical restrictions on automated querying.

We also ask that you:

- + *Make non-commercial use of the files* We designed Google Book Search for use by individuals, and we request that you use these files for personal, non-commercial purposes.
- + *Refrain from automated querying* Do not send automated queries of any sort to Google's system: If you are conducting research on machine translation, optical character recognition or other areas where access to a large amount of text is helpful, please contact us. We encourage the use of public domain materials for these purposes and may be able to help.
- + *Maintain attribution* The Google "watermark" you see on each file is essential for informing people about this project and helping them find additional materials through Google Book Search. Please do not remove it.
- + *Keep it legal* Whatever your use, remember that you are responsible for ensuring that what you are doing is legal. Do not assume that just because we believe a book is in the public domain for users in the United States, that the work is also in the public domain for users in other countries. Whether a book is still in copyright varies from country to country, and we can't offer guidance on whether any specific use of any specific book is allowed. Please do not assume that a book's appearance in Google Book Search means it can be used in any manner anywhere in the world. Copyright infringement liability can be quite severe.

About Google Book Search

Google's mission is to organize the world's information and to make it universally accessible and useful. Google Book Search helps readers discover the world's books while helping authors and publishers reach new audiences. You can search through the full text of this book on the web at <http://books.google.com/>



THE
EXCHEQUER REPORTS.

REPORTS OF CASES

ARGUED AND DETERMINED IN THE

Courts of Exchequer & Exchequer Chamber.

VOL. V.

**HILARY VACATION, 13 VICT. to MICHAELMAS VACATION, 14 VICT.
BOTH INCLUSIVE.**

BY

W. N. WELSBY, OF THE MIDDLE TEMPLE,
E. T. HURLSTONE, } AND { J. GORDON,
OF THE INNER TEMPLE, } OF THE MIDDLE TEMPLE,
ESQUIRES, BARRISTERS-AT-LAW.

L O N D O N :

S. SWEET, W. MAXWELL, AND V. & R. STEVENS & G. S. NORTON.

Law Booksellers and Publishers.

HODGES & SMITH, GRAFTON STREET, DUBLIN.

1851.

LIBRARY OF THE
LELAND STANFORD, JR., UNIVERSITY
LAW DEPARTMENT.

a. 55521

JUL 9 1901

LONDON:

W. H. COX, PRINTER, 5, GREAT QUEEN STREET,
LINCOLN'S-INN-FIELDS.

JUDGES
OF THE
COURT OF EXCHEQUER,
DURING THE PERIOD COMPRISED IN THIS VOLUME.

The Right Honourable Sir FREDERICK POLLOCK, Knt., Chief Baron.

BARONS.

The Right Honourable Sir JAMES PARKE, Knt.
Sir EDWARD HALL ALDERSON, Knt.
Sir ROBERT MONSEY ROLFE, Knt.
Sir THOMAS JOSHUA PLATT, Knt.
Sir SAMUEL MARTIN, Knt.

ATTORNEYS-GENERAL { **Sir JOHN JERVIS, Knt.**
 { **Sir JOHN ROMILLY, Knt.**

SOLICITORS-GENERAL { **Sir JOHN ROMILLY, Knt.**
 { **Sir ALEXANDER JAMES EDWARD COCKBURN, Knt.**

1. The first part of the paper is devoted to a general discussion of the problem of the existence of a solution of the system of equations

$$\frac{dx}{dt} = A(x)u, \quad \frac{dy}{dt} = B(y)v, \quad (1)$$

$$\frac{dz}{dt} = C(z)w, \quad (2)$$

$$\frac{dw}{dt} = D(w)x, \quad (3)$$

$$\frac{dx}{dt} = E(x)y, \quad (4)$$

$$\frac{dy}{dt} = F(y)z, \quad (5)$$

$$\frac{dz}{dt} = G(z)w, \quad (6)$$

$$\frac{dw}{dt} = H(w)x, \quad (7)$$

$$\frac{dx}{dt} = I(x)y, \quad (8)$$

$$\frac{dy}{dt} = J(y)z, \quad (9)$$

$$\frac{dz}{dt} = K(z)w, \quad (10)$$

$$\frac{dw}{dt} = L(w)x, \quad (11)$$

$$\frac{dx}{dt} = M(x)y, \quad (12)$$

$$\frac{dy}{dt} = N(y)z, \quad (13)$$

$$\frac{dz}{dt} = O(z)w, \quad (14)$$

$$\frac{dw}{dt} = P(w)x, \quad (15)$$

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

	PAGE		PAGE
AMBERGATE, Notting-		Booker, Corlett v. -	197
ham, &c., Railway Com-		Bowditch v. Belchin -	378
pany v. Coulthard -	459	Bradley v. London and North	
Apothecaries' Company, <i>In</i>		Western Railway Com-	
re, v. Burt -	363	pany -	769
Archer v. Baynes -	625	Bradshaw, O'Connor v. -	882
Armstrong v. Normandy -	409	Brandford v. Freeman -	734
Ashpitel v. Sercombe -	147	Brett, Kaye v. -	269
Att-Gen. v. Great Western		Bristow v. Sequeville -	275
Railway Co. -	520	Brookes v. Tichborne -	929
—— v. Robson -	790	Brownrigg v. Rae -	489
		Brutton, Sims v. -	802
Bailey v. Sloggett, Doe <i>d.</i> -	107	Bryan v. Child -	368
Baker v. Heard -	959	Brymer, Thames Haven Dock	
—— v. Jones, Doe <i>d.</i> -	498	Company v. -	696
Barrow, Spotswood v. -	110	Buckley v. Hann -	43
Bashford, Mead v. -	336	Bullen, Taylor v. -	779
Baynes, Archer v. -	625	Burkinshaw v. Birmingham	
Belchin, Bowditch v. -	378	and Oxford Junction Rail-	
Bell, Dodgson v. -	967	way Company -	475
Berry, Turner v. -	858	Burningham, Grover v. -	184
Berton v. Lawrence -	816	Burnside, South Stafford-	
Birkenhead, Lancashire, and		shire Railway Company v. -	129
Cheshire Junction Rail-		Burt, <i>In re</i> Apothecaries'	
way Co. v. Pilcher 24, 114, 121		Company v. -	363
—— v. Cotesworth -	226	Butterfield, Job v. -	827
Birmingham and Oxford			
Junction Railway Com-		Caldwell v. Dawson -	1
pany, Burkenshaw v. -	475	Caledonian Railway Com-	
Bonar v. Mitchell -	415	pany, Wilson v. -	822

	PAGE		PAGE
Cameron's Coalbrook Steam		Doe <i>d. Baker v. Jones</i>	498
Coal Company, <i>Turner v.</i>	932	— <i>d. Jones v. Jones</i>	16
Candlish, <i>Wilkinson v.</i>	91	— <i>d. Bailey v. Sloggett</i>	107
Cannock, <i>Jones v.</i>	713	— <i>d. Childe v. Willis</i>	894
Carr <i>v. Mostyn</i>	69		
Carter, <i>Easton v.</i>	8	East Anglian Railways Com-	
Chambres <i>v. Jones</i>	229	pany, <i>Vertue v.</i>	280
Chaplin, <i>Greenland v.</i>	243	East Lancashire Railway	
Chapman <i>v. Milvain</i>	61	Company <i>v. Croxton</i>	287
Child, <i>Bryan v.</i>	368	Eastern Union Railway Com-	
Childe <i>v. Willis, Doe d.</i>	894	<i>v. Symonds</i>	237
Clarke, <i>Messenger v.</i>	388	Easton <i>v. Carter</i>	8
—, <i>Rennie v.</i>	292	Eastwood, <i>Hellawell v.</i>	982
Connell, <i>Penkivil v.</i>	381	Edan, <i>Wilson v.</i>	752
Corlett <i>v. Booker</i>	197	Emery, <i>In re</i>	834
Coryton, <i>Hernaman v.</i>	453	Ely <i>v. Moule</i>	918
Cotesworth, <i>Birkenhead,</i>		Exeter, (<i>Bishop of</i>), <i>In re</i>	
Lancashire, and Cheshire		Gorham <i>v.</i>	630
Junction Railway Com-			
pany <i>v.</i>	226	Fairbanks, <i>Nurdin v.</i>	738
Cottam, <i>Room v.</i>	820	Field, <i>Milner v.</i>	829
Cottenham (<i>Lord</i>), <i>Dimes v.</i>	311	Fleming, <i>Pope v.</i>	249
Coulthard, <i>Ambergate, Not-</i>		Fletcher, <i>Hill v.</i>	470
tingham, &c., Railway		Freeman, <i>Brandford v.</i>	734
Company <i>v.</i>	459	Friar <i>v. Grey</i>	584
Cranston <i>v. Marshall</i>	395	Forsyth, <i>Lewis v.</i>	904
Croxton, <i>East Lancashire</i>		Fox, <i>Knight v.</i>	721
Railway Company <i>v.</i>	287		
Cubitt <i>v. Thompson</i>	811	Glover <i>v. London and North</i>	
		Western Railway Company	66
Daubeny, <i>Pell v.</i>	955	Gorham, <i>In re, v. Bishop of</i>	
Dawson, <i>Caldwell v.</i>	1	Exeter	630
—, <i>Milnes v.</i>	948	Gould <i>v. Staffordshire Potte-</i>	
Dearden, <i>In re</i>	740	ries Waterworks Company	214
De Beauvoir <i>v. Owen</i>	166	Grand Junction Railway	
Derry <i>v. Toll</i>	741	Company, <i>Newton v.</i>	331
Devereux <i>v. Kilkenny and</i>		Great Western Railway Com-	
Great Southern and West-		pany, <i>Att.-Gen. v.</i>	520
ern Railway Company, <i>In</i>		Greenland <i>v. Chaplin</i>	243
<i>re Emery</i>	834	Gregory, <i>Murray v.</i>	468
Dickinson, <i>Sellers v.</i>	312	Grey, <i>Friar v.</i>	584
Diggle <i>v. London and Black-</i>		Grover <i>v. Burningham</i>	184
wall Railway Company	442		
Dimes <i>v. Cottenham (Lord)</i>	311	Hadow, <i>Prescott v.</i>	726
Dodgson <i>v. Bell</i>	967	Hall, <i>Moss v.</i>	46
Doe <i>d. Williams v. Howell</i>	299	Hamer, <i>Levy v.</i>	518

	PAGE		PAGE
Hann, Buckley v. -	43	Lawrence, Berton v. -	816
Hanslip v. Padwick -	615	Levy v. Hamer -	518
Hardy v. Tingey -	294	— v. Horne -	257
Harvey v. Hudson -	845	Lewis v. Forsyth -	904
Heard, Baker v. -	959	Linwood v. Squire -	234
Hellawell v. Eastwood -	982	Litchfield v. Ready -	939
Henderson v. Stobart -	99	Littlewood, Millward v. -	775
Hernaman v. Coryton -	453	London and Blackwall Rail- way Company, Diggle v. -	442
Hewitt, Rigby v. -	240	London, Brighton, and South Coast Railway Company, Skinner v. -	787
Hill v. Fletcher -	470	London and North Western Railway Company, Brad- ley v. -	769
Hitchings v. Thompson -	50	—, Glover v. -	66
Holborn Land-Tax Assess- ment, <i>In re</i> -	548	— v. M'Michael 114, 855	
Hooper, Tielens v. -	880	Lowe v. Ross -	553
Horne, Levy v. -	257	Lowther, Matthews v. -	574
Howell, Doe & Williams v. -	299	Lush v. Russell -	203
Hudson, Harvey v. -	845	Lyons v. Hyman -	749
Hughes, Jones v. -	104		
Humphreys v. Jones -	952	M'Clure v. Ripley -	140
Hunter, Medlicott v. -	34	M'Michael, London and North Western Railway Company v. -	114, 855
Hutchinson v. York, New- castle, and Berwick Rail- way Company -	843	M'Namara, Mais v. -	267
Hyman, Lyons v. -	749	Macrory v. Scott -	907
		Mais v. M'Namara -	267
James, <i>In re</i> -	310	Malcolm v. Scott -	601
Jay, Wigmore v. -	354	Marshall, Cranston v. -	395
Jeffries v. Williams -	792	Mather, Milvain v. -	55
Job v. Butterfield -	827	Matthews v. Lowther -	574
Johnson, Jones v. -	862	Mead v. Bashford -	336
Jones v. Cannock -	713	Medlicott v. Hunter -	34
—, Chambres v. -	229	Memoranda -	183, 719, 906
—, Doe & Baker v. -	498	Messenger v. Clarke -	388
—, Doe & Jones v. -	16	Millward v. Littlewood -	775
— v. Hughes -	104	Milner v. Field -	829
—, Humphreys v. -	952	Milnes v. Dawson -	944
— v. Johnson -	862	Milvain, Chapman v. -	61
		— v. Mather -	55
Kay, Sangster v. -	386	Mitchell, Bonar v. -	415
Kaye v. Brett -	269	Moss v. Hall -	46
Kilkenny and Great South- ern and Western Railway Company, <i>In re</i> Emery, Devereux v. -	834	Mostyn, Carr v. -	69
Knight v. Fox -	721	Mott, Skelton v. -	231

	PAGE		PAGE
Moule, Ely v. - - -	918	Sequeville, Bristow v. -	275
Murray v. Gregory - -	468	Sercombe, Ashpitel v. -	147
—— v. Wills - - -	715	Shield v. Wilkins - -	304
Newton v. Grand Junction		Shropshire Union Railways	
Railway Company - -	331	and Canal Co., Wynn v. -	420
Norman, Ross v. - - -	359	Simpkins v. Potheary -	253
Normandy, Armstrong v. -	409	Sims v. Brutton - - -	802
North Western Railway		Skelton v. Mott - - -	231
Company v. M ^c Michael 114,	855	Skinner v. London, Brighton,	
Nurdin v. Fairbanks - -	738	and South Coast Railway	
Nyssen v. Ruysenaers -	857	Company - - -	787
O'Connor v. Bradshaw -	882	Sleigh v. Sleigh - - -	514
Owen, De Beauvoir v. -	166	Sloggett, Doe d. Bailey v. -	107
Padwick, Hanslip v. - -	615	Smith, South Staffordshire	
Parry v. Thomas - - -	37	Railway Company v. -	472
Pell v. Daubeny - - -	955	Sodor and Man (Bishop of),	
Penkivil v. Connell - -	381	Vincent v. - - -	683
Pilcher, Birkenhead, Lanca-		South Staffordshire Railway	
shire and Cheshire Junc-		Company v. Burnside -	129
tion Railway Co. v. 24, 114,	121	—— v. Smith - - -	472
Pope v. Fleming - - -	249	Southgate v. Saunders -	565
Potheary, Simpkins v. -	253	Spotswood v. Barrow -	110
Prescott v. Hadow - -	726	Squire, Linwood v. - -	234
Rae, Brownrigg v. - - -	489	Staffordshire Potteries Water-	
Ready, Litchfield v. - -	939	works Company, Gould v. -	214
Rennie v. Clarke - - -	292	Stanton v. Styles - - -	578
Richardson v. Worsley -	613	Stevens v. Stevens - -	306
Rigby v. Hewitt - - -	240	Stobart, Henderson v. -	99
Ripley, M ^c Clure v. - -	140	Styles, Stanton v. - -	578
Robinson, Wills v. - -	302	Sutherland v. Wills -	715, 980
Robson, Attorney-General v.	790	Swann, Von Dodelszen v. -	825
Room v. Cottam - - -	820	Symonds, Eastern Union	
Ross, Lowe v. - - -	553	Railway Company v. -	237
—— v. Norman - - -	359	Taylor v. Wilson - - -	251
Russell, Lush v. - - -	203	—— v. Bullen - - -	779
Ruysenaers, Nyssen v. -	857	Thames Haven Dock Com-	
Sangster v. Kay - - -	386	pany v. Brymer - - -	696
Saunders, Southgate v. -	565	Thomas, Parry v. - - -	37
Scott, Malcolm v. - - -	601	—— v. Thomas - - -	28
——, Macrory v. - - -	907	Thompson, Cubitt v. -	811
Sellers v. Dickinson - -	312	——, Hitchings v. - -	50
		Tichborne, Brookes v. -	929
		Tielens v. Hooper - -	830
		Tingey, Hardy v. - -	294
		Toll, Derry v. - - -	741

	PAGE		PAGE
Townend v. Woodruff -	506	Willis, Doe d. Childe v.	894
Turner v. Berry -	858	Wills v. Robinson -	302
—— v. Cameron's Coal-		——, Murray v. -	715
brook Steam Coal Co. -	932	——, Sutherland v. -	715, 980
Vertue v. East Anglian		Wilson v. Caledonian Rail-	
Railways Company -	280	way Company -	822
Vincent v. Sodor and Man		—— v. Eden -	752
(Bishop of) -	683	——, Taylor v. -	251
Von Dadelszen v. Swann -	825	Woodruff, Townend v. -	506
Washington v. Young -	403	Woodward, Wiles v. -	557
Wigmore v. Jay -	354	Worsley, Richardson v. -	613
Wiles v. Woodward -	557	Wynn v. Shropshire Union	
Wilkins, Shield v. -	304	Railways and Canal Co. -	420
Wilkinson v. Candlish -	91	York, Newcastle, and Ber-	
Williams v. Howell, Doe d. -	299	wick Railway Company,	
——, Jeffries v. -	792	Hutchinson v. -	343
		Young, Washington v. -	403

ERRATA.

- Page 41, line 6 from the bottom, for "necessary" read "unnecessary"
 — 87, line 17 from the top, for "chapelry." read "chapel."
 — 184, marginal note, line 7 from the bottom, for "shall" read "hath"
 — 234, ————— between lines 20 and 21 insert "The defendant"
 — 415, ————— line 15 from the top, before "to" insert "payable"
 — ————— 31 ————— for "payment," read "non-payment,"
 — 489, ————— 19 ————— for "advance." read "arrear."

Exchequer Reports.

HILARY VACATION, 13 VICT.

CALDWELL v. DAWSON.

1850.

Feb. 7.

DEBT on an indenture, whereby the defendant covenanted to pay the plaintiff 700*l.* and interest, on the 6th of March, 1847.—Plea, non est factum.

At the trial, before *Pollock*, C. B., at the Surrey Summer Assizes, 1849, the plaintiff gave in evidence the indenture, the material part of which is as follows:—

This indenture, made the 26th December, 1846, between Samuel Thomas, (who is hereinafter, for the sake of brevity, styled “the said borrower”), of the first part; George Dawson, of the second part; and Frederick Caldwell, Henry Chilton, and Frederick James Fuller, of the third part. Whereas, by a policy of assurance of the English and Scottish Law Life Assurance and Loan Association, dated &c., the funds of the said Association are charged with the payment to the executors, administrators, or assigns of the said borrower, of 1400*l.* within three months after proof of his decease, subject to the payment of an annual premium of 38*l.* 10*s.*, and to the provisions in the said policy expressed. And whereas the said borrower hath agreed with the said parties hereto of the third part, for the loan of 700*l.*, on the security of an assignment of the said policy, and also by the joint and several covenants of the said bor-

An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3, c. 184, Sched. Part 1, and therefore requires an ad valorem stamp.

VOL. V.

B

EXCH.

1850.
CALDWELL
v.
DAWSON.

rower and of the said party hereto of the second part hereinafter contained. Now this indenture witnesseth, That, in consideration of the sum of 700*l*. to the said borrower paid by the said parties hereto of the third part, before the execution of these presents, the receipt whereof the said borrower doth hereby acknowledge, he the said borrower doth by these presents grant, bargain, sell, assign, and transfer unto the said parties hereto of the third part, their executors, administrators, and assigns, all that the said recited policy, and the money thereby insured, and all bonuses, benefit, and advantage to be had or received therefrom, to have, hold, receive, and take the said policy, monies, and premises unto the said parties hereto of the third part, their executors, administrators, and assigns; subject, nevertheless, to the proviso for redemption hereinafter contained. [Here followed a power of attorney, enabling the parties of the third part to receive the amount of the policy.] Provided always, that in case the said borrower, his heirs, executors, or administrators shall pay unto the said parties hereto of the third part, their executors, administrators, or assigns, on the 26th March now next ensuing, the sum of 700*l*., with interest thereon at the rate of 5*l*. per centum per annum, then the said parties hereto of the third part, their executors, &c. will, at the request and charges of the said borrower, his executors, &c., re-assign the said policy unto the said borrower, his executors, &c. And the said borrower, and, as his surety, the said party hereto of the second part, do hereby for themselves, their heirs, executors, and administrators, jointly and severally covenant with the said parties hereto of the third part, their executors, administrators, and assigns, that they the said parties hereto of the first and second parts, or some or one of them, their, or some or one of their executors, administrators, or assigns, will pay to the said parties hereto of the third part, their executors, administrators, or assigns, the said sum of 700*l*. and interest as aforesaid, on the 26th March next, without any deduction whatsoever; and also will from time

1850.
 CALDWELL
 v.
 DAWSON.

to time during the life of the said borrower, pay the premiums and expenses which ought to be paid for keeping the said policy on foot, or for effecting and keeping on foot any renewed or substituted policy. And in case default shall be made in payment of any such annual premium or expenses, it shall be lawful for the said parties hereto of the third part, and the survivors and survivor of them, and the executors and administrators of such survivor, and their or his assigns, from time to time, as long as any money shall remain secured by these presents, to keep on foot such assurance as aforesaid, and in case of the forfeiture or determination of the said policy, to renew the same policy, or effect a substituted policy with the said society for the like amount upon the life of the said borrower, and to pay the premiums and other expenses thereon. And that the said parties hereto of the first and second parts, their heirs, executors, or administrators, or some or one of them, will, within one calendar month or sooner, on demand thereof pay unto the said parties hereto of the third part, their executors, administrators, or assigns, all such money as they or he shall expend about such assurance, with interest thereon after the rate of 5*l.* for every 100*l.* by the year; and the said policy or such substituted policy shall be a security for the repayment of the same sums and interest, in addition to the said sum of 700*l.* and the interest thereof, and the costs, charges, and expenses occasioned by the non-payment thereof; but so, nevertheless, that the total amount of principal money to be ultimately recoverable under these presents shall not exceed the sum of 700*l.*; and also that the said borrower will not do any act or commit any default whatsoever by means of which the said recited policy or any substituted policy shall be impeached or become void or voidable, or by reason whereof any higher rate of premium may become payable thereon, &c.

This indenture was stamped as a deed with a 1*l.* 15*s.* stamp. It was objected, on behalf of the defendant, first,

1850.
 CALDWELL
 v.
 DAWSON.

that this was an assignment by way of mortgage of the policy of assurance, and therefore required an ad valorem stamp under the 55 Geo. 3, c. 184, Sched. Part 1, "Mortgage;" secondly, that there was a variance, inasmuch as the covenant contained in the indenture was not an absolute covenant on the part of the defendant to pay, but a collateral covenant, that the party of the first part or the defendant would pay, and that debt would not lie on such a covenant. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

Peacock, in the following term, moved upon both objections; but the Court, after referring to the case of *Caldwell v. Becke* (a), refused the rule upon the last point, and granted it upon the first.

Martin and Wordsworth now shewed cause.—As between the plaintiff and the defendant, who is a surety, this instrument is a mere covenant to repay the 700*l.* with interest, and is, therefore, properly stamped as a deed: *Walmesley v. Brierly* (b). It is said that the assignment of the policy of assurance renders it a mortgage within the Stamp Act; but such a policy is only an engagement on the part of the association, in consideration of an annual payment by the assured, to pay to his representatives a certain sum after his decease. That is a mere chose in action, the equitable right to which can alone be assigned, and upon which any action must be brought in the name of the assignor. It is not "lands, estate, or property, real or personal, heritable or moveable," within the terms of the 55 Geo. 3, c. 184, Sched. Part 1, "Mortgage." A judgment debt is a more effective description of property than a policy of assurance, inasmuch as the judgment creditor may take either the person or property of his debtor in execution; yet it has been expressly decided that an assignment by indenture of

(a) 2 Exch. 318.

(b) 1 M. & R. 529.

1850.
 CALDWELL
 v.
 DAWSON.

a judgment debt is not an assignment of *property*, within the 55 Geo. 3, c. 184, Sched. Part 1, "Conveyance:" *Warren v. Howe* (a). Where a policy of assurance on goods, on a voyage to India, was assigned as a security for the payment of an annuity, that was held not to be a conveyance of property within the meaning of the same Act: *Blandy v. Herbert* (b). In the case of *Coates v. Perry* (c), several debtors conveyed their goods and effects to trustees, in trust to sell, and with the proceeds to discharge, first, debts due to the trustees, then debts due to other creditors, with a resulting trust for the original debtors; and it was held, that such deed did not require a stamp as upon a "conveyance" or "mortgage." Even assuming that a policy of assurance is "property" within the meaning of the Stamp Act, it is an established rule, that, where a deed has a double operation, its principal object must be looked at, with reference to the stamp: *Corder v. Drakeford* (d), *Price v. Thomas* (e). The principal object of this deed was to secure the repayment of the loan, and the defendant had no interest whatever in the policy.

Douglas, in support of the rule.—In *Warren v. Howe* (a), the transaction, which was, in point of fact, a mortgage, was held not to be a *conveyance* within the Schedule, tit. "Conveyance," because the words "other property" were restricted to property *ejusdem generis*, that is, property which could be the subject of a sale. The Schedule, tit. "Mortgage," contains the words "affecting any lands, estate, or property real or personal *whatsoever*;" so that the word "property" under that head cannot be construed as property *ejusdem generis*. A policy of assurance is property within that clause, which comprehends everything which may be the subject of a mortgage. [He referred to *Horsfall v. Hey* (f).]

- (a) 2 B. & C. 281.
 (b) 9 B. & C. 396.
 (c) 6 Moore, 188.

- (d) 3 Taunt. 382.
 (e) 2 B. & Ad. 218.
 (f) 2 Exch. 778.

1850.
 CALDWELL
 v.
 DAWSON.

POLLOCK, C. B.—The rule must be absolute. If there were any decided case in point, that might be considered as a judicial exposition of the law which would bind us; but I can find none.

PARKE, B.—I am of the same opinion. If I were called upon to construe, for the first time, this clause in the Stamp Act, I should say that the instrument in question would fall under the description of a mortgage affecting personal property. The language of the statute is very wide, embracing every description of property; and if we are not fettered by any previous decision, it seems to me impossible to say, that a policy of assurance, being a valuable article of sale, is not “property” within the meaning of that Act. The question then is, whether there has already been any satisfactory decision on the subject. Now, *Warren v. Howe* (a), which has been relied on, was the case of an assignment by indenture of a judgment debt, not by way of sale, but upon trust to pay the expenses of the assignment, and of enforcing payment, and then to pay the assignee the amount of his debt, and the residue to the assignor. It was argued by counsel, that the instrument fell within the description of a “conveyance,” or, if not, within that of a “mortgage.” Lord *Tenterden* disposed of the latter objection by saying, that it did not fall within that clause, because it was not a conveyance of property in trust for sale. It is clear, therefore, that the only point to which Lord *Tenterden*’s attention was addressed, was, whether the instrument fell within the clause of sale; and he says, that the expression “other property” in that clause, “applies only to property of the same description as that previously mentioned, viz. such property as is usually the subject of sale, and may be converted into money.” The case of *Blandy v. Herbert* (b) may be explained in the same way. There also there were two questions; in the first place, whether the transaction described in the deed

(a) 2 B. & C. 281.

(b) 9 B. & C. 396.

could be considered as the sale of an annuity; and the Court thought there was no pretence for that. With respect to the other point, Lord *Tenterden* says, "I am of opinion that the policy (no loss having occurred) cannot be considered *property*, within the meaning of the 55 Geo. 3, c. 184, Sched. Part 1." So that his attention was not at all directed to the case of a mortgage. That being so, we are not, in the present case, concluded by either of those decisions, and, viewing the clause itself, I have no doubt that it was meant to comprise every description of property conveyed by way of mortgage.

1850.
 CALDWELL
 v.
 DAWSON.

ALDERSON, B.—I am of the same opinion. A policy of assurance is "property" in the ordinary sense of the word. It certainly would pass by a devise of all the testator's property; and if so, it is a strong assertion to say, that it is not "property" within the Stamp Act. In the case of *Warren v. Howe* Lord *Tenterden* seems to have thought that the expression "other property" applied only to such property as could be transferred *at law* from a seller to a purchaser. Whether that opinion is correct is not the question now before us; but it would be strange if the Stamp Act was not intended to apply to the transfer of an equitable interest in land. Certainly the words under the head "Conveyance" in the schedule ought not to be construed so strictly, for they speak of "*right, title, or interest in property.*" But the mortgage clause is not within the difficulty which prevailed in Lord *Tenterden's* mind, for that imposes the duty on any property that may be *affected* by the mortgage. There is no doubt that the property here can be affected by the mortgage, and consequently the instrument requires a stamp within the very words of the Act.

ROLFE, B.—I am of the same opinion, though reluctantly; for I regret that such an objection should prevail when the parties, perhaps, meant to do right, but were misled by the

1850.
 CALDWELL
 v.
 DAWSON.

marginal note in *Warren v. Howe*. That case seems to have proceeded on the ground that a judgment debt was not the ordinary subject of a sale. Lord *Tenterden* says, that the assignment in that case was not a "mortgage," for it was not a conveyance of property in trust for sale. Whether that is right or not we need not now inquire. He also says, that the assignment was not a "conveyance," because that clause refers to such property as is usually the subject of sale, and that a judgment debt is not; and so he concludes that the assignment did not come within either of those descriptions of instruments which require an ad valorem stamp. Notwithstanding that decision, I must own, that if ever I should be the purchaser of a judgment debt, or of a policy of assurance, I should insist upon having it stamped with an ad valorem duty.

Rule absolute.

Feb. 12.

EASTON, Executor of P. ROSE, deceased, v. CARTER.

To an action on an indenture, whereby the defendant covenanted to pay R., the plaintiff's testator, 700*l.*, the defendant, after setting out on oyer the will and probate granted by the Archbishop of Canterbury, pleaded that R. died in the

DEBT on an indenture, whereby the defendant covenanted to pay P. Rose, the plaintiff's testator, 700*l.*, with interest, on a day certain.—Breach, non-payment. The declaration concluded with profert of the letters testamentary in the usual form.

The defendant, after setting out on oyer the will and probate thereof, which was granted by the Archbishop of Canterbury, pleaded, that the said P. Rose died in the parish of Longfleet, in the county of Dorset, and before and

parish of L., and, at the time of his death, was resident and had the indenture in that parish; that the parish of L. is a royal peculiar, and out of the jurisdiction of the said Archbishop, by reason whereof the proving the will and granting probate of the goods of R., in respect of the said debt and cause of action, of right belonged to the Queen and not to the Archbishop; that the will was never proved before, nor were letters testamentary of R. ever granted by, the Queen; and the letters testamentary so produced in Court, and granted by the said Archbishop, are of no effect against the defendant in respect of the said debt and cause of action; and save as aforesaid, by the granting of those letters testamentary, the plaintiff never was executor of R. On special demurrer—*Held*, first, that the plea was properly pleaded in bar of the action generally; secondly, that it did not amount to an argumentative plea of ne unques executor.

1850.
 EASTON
 v.
 CARTER.

at the time of his death was resident and commorant at that parish; and before and at the time of his death, the said indenture was, and the said P. Rose had the same, in the same parish; that the parish of Longfleet, during all the time aforesaid, was, and from thence hitherto hath been, and still is within her Majesty the Queen's royal peculiar jurisdiction of her Free Chapel of Great Cranford, in the county aforesaid, and out of the jurisdiction of the Archbishop of the province of Canterbury; by reason whereof, the proving of the will of the said P. Rose, and the granting of all and singular the goods, chattels, and credits of the said P. Rose in respect of the said debt and cause of action, which during all the time aforesaid was and is of the value of 5*l.*, of right belonged and appertained to her Majesty the Queen, and not to the said Archbishop of Canterbury; that the said will was never proved before, nor were letters testamentary of the said P. Rose ever granted by, her said Majesty the Queen, and the said letters testamentary so produced in Court and so granted by the said Archbishop, are of no effect against the defendant in respect of the said debt and cause of action; and (save as aforesaid by the granting of the said letters testamentary), the plaintiff never was executor of the last will and testament of the said P. Rose.—Verification.

Special demurrer, assigning for causes, that the plea is neither good as a plea in confession and avoidance, nor as a plea by way of traverse; that it discloses mere matter of evidence, and no material issue can be raised upon it; that it proceeds upon the false assumption that an executor derives his title, not from the will itself, but from the probate; that it amounts only to an argumentative denial of the plaintiff's representative character.—Joinder in demurrer.

Maynard argued in support of the demurrer (Feb. 11).—

1850.
 EASTON
 v.
 CARTER.

The plea is bad in substance and in form. First, the subject-matter of the plea is not a bar which goes to the commencement of the action, but only to its further maintenance. In the case of an administrator it would be different. An administrator derives title from the letters of administration, but an executor may commence an action before probate: *Wankford v. Wankford* (a). So that it is consistent with this plea that the plaintiff had a good right of action at the commencement of the suit. No doubt, it is laid down that, though an executor may *commence* an action, he cannot proceed without probate. The meaning, however, of that is, that he must be in a situation to grant oyer of the letters testamentary if demanded, which can be done here. The plea, then, admitting the right to bring the action, and simply denying the right to proceed, ought not to have been pleaded in bar of the action generally, but in bar of its further maintenance: *Le Bret v. Papillon* (b). Besides, the bar pleaded is one which may be removed before trial, and therefore affords no answer to the action: *Bradley v. Bardsley* (c). A plaintiff is entitled to recover on the issue of *ne unques executor*, although he may not have taken out probate till some months after the declaration: *Thompson v. Reynolds* (d).

Secondly, the plea amounts to an argumentative plea of *ne unques executor*. In this stage of the proceedings, it is sufficient for the plaintiff to produce a will authenticated by the seal of any Court of competent jurisdiction; and if the defendant requires the plaintiff's title to be proved, he should plead *ne unques executor*. It is not like a profert of letters of administration, which must be shewn to have been granted by the ordinary: *Hughes v. Williams* (e).

(a) 1 Salk. 299.

(b) 4 East, 502.

(c) 14 M. & W. 873.

(d) 3 C. & P. 123.

(e) 2 Cr. M. & R. 331.

Besides, this is merely pleading evidence. In *Comber's case* (a), Lord *Macclesfield*, C., says, "If this had been an administration granted by the archdeacon or ordinary, where there were bona notabilia in divers dioceses, the administration had been merely void; for the administrator receives his right entirely from the administration, but the right of the executor is derived from the will, and not from the probate, as appears from an executor having power to release or assign any part of the personal estate before probate; and a defendant at law cannot plead to any action brought by an executor, that the plaintiff has not proved the will, though it is true he may demur, if the plaintiff does not in his declaration shew the probate." [*Parke*, B.—The latter passage cannot be correct. If an executor has taken out probate in a Court which has no jurisdiction to grant it, surely that fact may be pleaded by way of defence. Suppose this had been a forged will, and a temporal Court, having no power to decide as to its validity, held it to be a good will, the executor would have a right to recover: *Allen v. Dundas* (b).] In *Middleton's case* (c), "It was adjudged in the Common Pleas that an executor, before probate, might release an action, although, before probate, he could not have an action; for the right of action is in him; but if A. releases, and afterwards takes administration, it shall not bar him; for the right of action is not in him at the time of the release: vide 18 Hen. 6, 43b; *Griesbrook's case*, Plowd. Com. 277, 278; 21 Edw. 4, 24a." The proper form of plea would have been, "that, as to the causes of action contained in the declaration, the plaintiff never was executor modo et formâ" (d). Where the law has provided an appropriate mode of denial of particular facts, that must be followed by the pleader: *Sutherland v. Pratt* (e). A probate is merely operative as the

1850.
 EASTON
 v.
 CARTER.

(a) 1 P. Wms. 766.

(b) 3 T. R. 125.

(c) 5 Rep. 55.

(d) 3 Chit. Plead. 129.

(e) 11 M. & W. 296.

1850.
 EASTON
 v.
 CARTER.

authenticated *evidence*, and not at all as the foundation of the executor's title: 1 Wms. Exors. 239; *Smith v. Willes*(a). No doubt, this form of plea would be good in the case of an administrator: *Stokes v. Bate*(b); but in an action by an executor, the whole matter is in issue under the plea of *ne unques executor*. In the case of a banker's cheque, it has been held, that the objection that the cheque was post-dated, and not properly stamped, ought not to be specially pleaded: *Field v. Woods*(c). [He also referred to *Gurney v. Rawlins*(d).]

Willes, contra.—An executor is bound to have a probate to produce at the time of declaration. In *Thompson v. Reynolds*, the defendant did not avail himself of his right to demand oyer of the letters testamentary. In 1 Wms. Exors., p. 242, it is said, "An executor cannot maintain actions before probate, unless such as are founded on his *actual* possession, for in actions where he sues in his representative character, he is bound, when he declares, to make profert of the letters testamentary, otherwise the defendant may demur." And in a note to that passage it is added, "If the executor makes profert when in fact he has not obtained the letters, the defendant should crave oyer." [*Alderson*, B.—I do not see how this defence could be pleaded in bar of the further maintenance of the action, because that implies that there is *now* some change in the situation of the plaintiff, so that he cannot do what he could do before.] In pages 266, 267 of the same work, the distinction is pointed out between a prerogative and a diocesan probate, and it is laid down, that where the deceased had bona notabilia in divers dioceses in the same province, a diocesan probate is absolutely void, and "the defendant may plead in bar to an action brought by such

(a) 1 T. R. 480.

(c) 7 A. & E. 114.

(b) 5 B. & C. 491.

(d) 2 M. & W. 87.

an executor or administrator, that there were bona notabilia in divers dioceses, or may give that matter in evidence upon a plea of ne unques executor, or ne unques administrator, for it confesses and avoids, and does not falsify the seal of the ordinary." The law is stated in similar terms in 1 Wms. Saund. 275 a, n. (3). This plea is therefore good by way of confession and avoidance; it admits that the archbishop has power to determine as to the existence of the will, and that the plaintiff is executor for some purposes, but shews that the archbishop had no jurisdiction to grant this particular probate. [*Platt*, B., referred to *Crosse v. Corbocke*(a), and *Vin. Abr.* "Executors," (I 2).]

1850.
EASTON
v.
CARTER.

Maynard, in reply, referred to *Smith v. Smith*(b), and 1 Wms. Saund. 249.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—(After stating the pleadings, his Lordship proceeded): It was admitted in this case, and properly, that the probate granted by the Prerogative Court did not operate on this debt by specialty, the deed having been, at the time of the testator's death, in the royal peculiar, over which the archbishop never had any jurisdiction, and that the case differs in that respect from that of *Lysons v. Burrow*(c), where a prerogative probate of the Archbishop of York was held not to be void, but only voidable, where, in an action for a simple contract debt, the defendant resided in a peculiar, and not a royal peculiar, in the archbishop's province.

But it was contended, for the defendant, that the plea was bad for two reasons: First, That the plea, there being no

(a) 2 Anders. 132. (b) 3 Hagg. 757. (c) 2 Bing. N. C. 486.

1850.

EASTON
v.
CARTER.

allegation that it was pleaded in bar of the further maintenance of the action, must be taken, as no doubt it must, to have been pleaded in bar generally, and that it ought to have been pleaded in bar of the further maintenance of the action. Secondly, That the plea was bad, as amounting to an argumentative plea of ne unques executor, and did not sufficiently confess and avoid the allegation that the plaintiff was executor, and was merely pleading evidence. We think both these objections are unfounded.

It is unnecessary to decide whether the first objection can be made on general demurrer. Probably not; but supposing it could, we think the plea is perfectly good as it is pleaded.

The plea is really not in bar of the further maintenance of the action, but in bar of it altogether; for though it is true that an executor may bring an action before he has obtained probate, yet that is, provided he produces the probate at the proper time when the law requires him to do so, viz when he declares and makes profert, and the defendant craves oyer of it. This is explained in Rolle's Abridgment, "Executors," (A), p. 917: "If an executor, before probate of the will, bring an action of debt on an obligation due to him as executor, but when he declares he shews it to the Court proved, it being proved after the action brought, still the action is well brought, because he was executor before probate; although by the law he is not permitted to sue before probate, yet, it being proved, *the impediment is removed ab initio*, for he, by shewing the will to the Court, satisfies the ceremony which the law requires, which he had done as the law requires." If he does not satisfy the condition so required, and remove the impediment *ab initio*, he has not brought the action properly, and ought therefore to be barred.

The other objection, also, is not well founded. The defence made by the plea is not that the plaintiff is not executor of the testator's will, but that he has no authority to

recover the particular sum due on the indenture, because the instrument itself was in a parish which was a royal peculiar, and that the executor, by the prerogative probate, had no right to recover the money due on it. The case closely resembles that of *Stokes v. Bate* (a), where the plaintiff sued on letters of administration granted by the Bishop of Chester, and on a plea of *ne unques administrator* the Court held, that the objection, that the particular debt sought to be recovered was, at the time of the testator's death, in another diocese, was not admissible, and that the fact ought to have been specially pleaded. The plea in this case is framed according to that suggestion. It admits the plaintiff's general title as executor, and so gives implied colour, but shews that he had no authority over the particular debt. In the case of *Stokes v. Bate*, the argument that, under the plea of *ne unques administrator*, the question was, whether the plaintiff was administrator as to the particular debt sought to be recovered, did not prevail, nor ought a similar argument, that the meaning of the issue *ne unques executor* would be, that he was not executor as to the particular debt, to prevail here; and that question is an answer to the objection, that the plea only pleads evidence, as also is the case of *Crosse v. Corbocke* (b). Further, if the defendant had pleaded such a plea where the object was to avoid the probate altogether, we do not say it would be a bad plea. In the note in Saunders' Reports, p. 275, n. (3), and Williams on Executors, vol. 1, p. 267, the plea of *ne unques executor* and *ne unques administrator* are both put on the same footing, and it is said that the defendant may either give evidence of *bona notabilia* on that plea, or plead specially. In this case, however, there is no doubt that the plea is good.

1850.
EASTON
v.
CARTER.

Judgment for the defendant.

(a) 5 B. & C. 491.

(b) 2 Anders. 132.

1880.

Feb. 25.

DOE *d.* OWEN JONES *v.* DAVID JONES and Others.

An assignment of a mortgage of turnpike-tolls, according to the form prescribed by the 3 Geo. 4, c. 126, s. 81, has no validity unless produced and notified to the proper clerk or treasurer, and by him entered in the book kept for that purpose, within two months from its date.

The fact of the clerk having prepared, or attested the execution, of the transfer, is evidence from which a jury may infer a notification to him.

Where the trustees held meetings and had separate clerks at several places within their district,—*Held*, that the clerk of the place in which the mortgage was made and entered was the proper clerk to receive the notification, although the mortgage included the tolls of the whole district, and the clerk was himself the mortgagee.

EJECTMENT for toll-houses, toll-gates, and tolls.—The declaration contained two demises by Owen Jones, the date of the first being the 11th of May, 1849, and the second, the 18th of May, in the same year.

At the trial, before *Maule*, J., at the Merionethshire Summer Assizes, 1849, the following facts appeared:—The lessor of the plaintiff, Owen Jones, claimed to recover as mortgagee of the tolls in the Bala district of the Merionethshire trust. The trustees acting under certain local Acts of Parliament had divided the trust into several districts, called respectively the Bala, Dolgelley, Ffestiniog, Barmouth, and Towyn districts; at each of those places they held meetings, and for each district a separate clerk was appointed, and mortgages granted, and registers kept. The mortgages in question were made according to the form of transfer given by the general Turnpike Act, 3 Geo. 4, c. 126, s. 81, and extended over all the tolls within the trust, but were granted at Barmouth, where John Jones was the clerk. The first mortgage was dated the 29th of September, 1834, and was made by the trustees acting under the local Act, 59 Geo. 3, c. xcvi, and the general Turnpike Act, to one Evans, to secure a loan of 100*l.* Evans having died, his executors, in May 1842, assigned the mortgage to Lewis Pugh, and on the 10th of May, 1849, Pugh assigned it to the lessor of the plaintiff. The transfer to Pugh was not in any formal manner notified to any clerk or treasurer of the trustees, but the signature of one of the executors of Evans was witnessed by John Jones. No entry of this transfer was made within

The trustees being indebted to their clerk in 81*l.*, for business done as a solicitor, gave him a mortgage for 80*l.*, which recited the consideration to be money advanced by him to them:—*Held*, that the mortgage was valid under the 3 Geo. 4, c. 126, s. 81, the transaction being equivalent to money “borrowed and taken up at interest” by the trustees.

two months after the date thereof, as required by the 3 Geo. 4, c. 126, s. 81 (a); but John Jones entered it in the book

1850.

Don
d.
JONES
v.
JONES.

(a) Knacts, "That it shall be lawful for the trustees or commissioners of any turnpike road *to borrow and take up at interest*, on the credit of the tolls arising on such road, any sum or sums of money as they shall from time to time respectively think proper, and to demise and mortgage the tolls on such road, or any part or parts thereof, and the turnpikes and toll-houses for collecting the same (the costs and charges of which mortgages shall be paid out of the tolls), as a security to any person or persons, or their trustees, who shall advance such sum or sums of money, which mortgages shall be in the words or to the effect following, (that is to say)"—[Here follows a form of mortgage.] "And copies of all such mortgages shall be entered in a book or books to be kept for that purpose by the clerk or treasurer to the said trustees or commissioners, for which entry such clerk shall be paid the sum of five shillings and no more, out of the tolls payable on such road, and which said book or books shall and may at all seasonable times be perused or inspected without fee or reward; and it shall be lawful for all persons respectively, to whom any mortgage shall be made as aforesaid, or who shall be from time to time entitled to the money thereby secured, to assign or transfer his, her, or their right, title, and interest in and to such mortgage, and the principal money and interest thereby secured, to any other person or per-

sons whomsoever, which assignment or transfer may be made in the following words, or words to the like effect, to be indorsed on such mortgage security, or to be under-written or thereunto annexed, and signed in the presence of and attested by one or more credible witness or witnesses, (that is to say)"—[Here follows a form of assignment.] "Which transfer shall be produced and notified to the clerk or treasurer of the said trustees or commissioners within two calendar months next after the day of the date thereof, who shall enter the same in the said book or books, for which entry the said clerk or treasurer shall be paid the sum of five shillings, and no more; and such transfer shall then entitle such assignee, his executors, administrators, and assigns, to the full benefit of such mortgage security; and every such assignee may in like manner assign or transfer the same, and so toties quoties; and it shall not be in the power of any person or persons, (except the person or persons to whom the same shall be last transferred, his, her, or their respective executors or administrators,) to release, discharge, or make void the original mortgage security, or the monies due thereon, or any part thereof; and all persons to whom any such mortgage or transfer shall be made as aforesaid, shall, in proportion to the sum or sums of money thereby secured, be creditors on the tolls by such Act granted, and on

1850.

DOE
d.
JONES
v.
JONES.

kept by him, prior to the assignment to Owen Jones. This assignment was prepared by John Jones, as solicitor to his brother Owen Jones, but no entry of it was made in any book until the 18th of May, 1849. The second mortgage was made on the 25th of February, 1846, to John Jones, for 80*l*. At that time the trustees were indebted to John Jones in the sum of 81*l* for costs, and he having applied to them for money on account, they offered him this mortgage, which he accepted, leaving the 1*l* due. The mortgage stated the consideration to be 80*l*, advanced and paid by John Jones to the trustees. This mortgage was entered by John Jones in the book kept by him, within the two months, and it was assigned by him on the 11th of May, 1849, to the lessor of the plaintiff, and the transfer entered on the same day, in the book kept by John Jones, but there was no notification to any other clerk. Upon these facts it was objected, on behalf of the defendant, that the plaintiff was not entitled to recover on the first demise, because there had been no due notification to the proper clerk, or entry by him, of the transfers of the first mortgage, as required by the 3 Geo. 4, c. 126, s. 81. And it was objected, with respect to the second mortgage, that it was void, inasmuch as the consideration was not money borrowed and taken up at interest, within the 3 Geo. 4, c. 126, s. 81. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him, as the Court should direct.

Welsby moved accordingly in last Michaelmas Term, (Nov. 26).—First, the lessor of the plaintiff cannot recover on the first demise. Under the 3 Geo. 4, c. 126, s. 81, no interest passes to the assignee of the mortgage, unless the transfer has, within the prescribed time, been notified to the proper clerk,

the toll-gates and toll-houses in equal degree one with another, or in such order as shall be agreed upon and stipulated by the said

trustees or commissioners at the time of the advance of their respective shares."

1880.

Don
&
Jones
v.
Jones.

and by him entered in the book. It is true that the clause contains no negative words, but the enactment amounts to a negation that the transfer shall have any effect, until its provisions are complied with. It is similar to the case of an inrolment of a bargain and sale. Secondly, the lessor of the plaintiff is not entitled to recover on the second demise, for the 3 Geo. 4, c. 126, s. 81, only authorises the trustees to mortgage the tolls, for "money borrowed and taken up at interest." [*Parke, B.*—If the trustees had gone through the form of advancing to John Jones the amount of his bill of costs, and he had immediately given them back 80*l.*, that would have been evidence of money borrowed. This transaction is equivalent to that.] At the trial, reference was made to the case of *The Bank of England v. Anderson (a)*, which decided, that the acceptance by a banker of a bill drawn by a customer on account of money of the latter in the hands of the former, is a borrowing of money on the acceptor's bill, within the meaning of the Bank Acts. That, however, was a money transaction; here there is only an unliquidated claim for costs. [*Parke, B.*—The mortgage does not make the trustees debtors, but is a mere assignment of the tolls. Suppose the trustees had said to Jones, "We cannot give you the mortgage, unless you will advance the money," and he had then said, "You will consider me as advancing it," would not the transaction have been good? The parties in effect do the same thing. We feel no difficulty about this part of the case; therefore, as to that there will be no rule. Upon the first point, we will take time to consider.]

A rule having been subsequently granted upon that point,

Townsend and E. Beavan shewed cause (Feb. 14).—The 3 Geo. 4, c. 126, s. 81, is directory only, and does not impose as a condition precedent the notification and entry

(a) 4 Scott, 120.

1850.

Don
d.
JONES
v.
JONES.

of the transfer. The case is assimilated to that of a bargain and sale, which has no validity unless inrolled. But the language of the 27 Hen. 8, c. 16, is, that no lands "shall pass, alter, or change from one to another" by bargain and sale, except the same be made by writing, indented, sealed, and inrolled. The 3 Geo. 4, c. 126, does not in terms make the transfer invalid, unless the prescribed form is complied with. If, however, its language is to be read as imperative, the only meaning is, that the assignee shall not be entitled to the full benefit of his mortgage security; that is, to the payment of interest. The facts shew that there was a sufficient notification of the transfer. John Jones, who was clerk to the trustees, was the attesting witness of the assignment to Pugh, so that the transfer was notified to him at the time it was made. No particular form of notification is required. John Jones was also the proper clerk to whom the notification was to be made, for he was the clerk of the place in the district in which the original mortgage was entered. The second mortgage was to John Jones himself, and was assigned by him, and the transfer was entered in the book which he kept. [*Parke*, B.—There was surely evidence to go to the jury of a notification.]

Welsby and *Foulkes*, in support of the rule.—The lessor of the plaintiff is not entitled to recover on either demise. The statute is imperative, not directory merely, and the transfer only operates from the time of the notification and entry, if made within two months from the date of the assignment. Here there was no notification of the transfer to Pugh. [*Parke*, B.—There was a constructive notification.] The statute intends a notification to the clerk in his character of clerk, and for the purpose of getting the entry made. [*Rolfe*, B.—Might not the jury reasonably infer that, when Evans requested Jones to witness the transfer, he requested him to do all that was necessary to perfect it?] He was not the proper clerk to

1850.

DOE
d.
JONES
v.
JONES.

receive the notification, which should have been made to the clerk acting for the Bala district. A statute staple could not be acknowledged before any other persons than those appointed by the statutes: 2 Shep. Touch. 355. The second mortgage was made to Jones himself, and assigned by him, so that there ought to have been a notification of it to some independent officer. The 81st section uses the words "clerk or treasurer," no doubt with the view of providing for the case of the clerk being an interested party. At all events, the entry by the clerk in the proper book is a condition precedent to the validity of the transfer. [*Parke, B.*—A person who is the proper clerk to make the entry of a transfer by another, may make the entry of a transfer by himself. Therefore, there is an end of all question upon the second demise.] Then, as to the first demise, the interest of the lessor of the plaintiff never accrued, by reason of the entry not being duly made of the previous transfer. An assignment is a secret instrument, and without its entry the trustees cannot know whether a person who claims as assignee has any title, nor who has the priority of mortgage. The entry is also for the benefit of the assignee, and in order to give him an undisputed title. Looking, therefore, to the purposes of the statute, it must be read as if the legislature had used negative words. The case is not distinguishable from that of a bargain and sale, which has no validity until enrolment: 1 Shep. Touch. "Bargain and Sale," p. 223. *Davison v. Gill* (a) shews, that the form of transfer, if adopted, must be strictly pursued. And in *Hill v. The Manchester Water Works Company* (b), a bond executed by the Company, contrary to the provisions of their Act of Parliament, was held void, although the statute contained no negative words.

PARKE, B.—With respect to the second demise, we are

(a) 1 East, 64.

(b) 5 B. & Ad. 866.

1850.

Don
d.
JOHNS
v.
JOHNS.

all of opinion that the plaintiff is entitled to retain the verdict. As to the other demise, we will take time to consider.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—In this case the lessor of the plaintiff seeks to recover turnpike tolls on two demises,—one, the 11th of May, 1849; the other, the 18th of May in the same year.

We disposed of the case, so far as related to the second demise, on the argument a few days ago, and held that the lessor of the plaintiff was clearly entitled to the verdict on that demise.

But, as it is suggested that our decision is required as to his right to recover on the first demise, in order to determine which of the two parties ought to have the costs of an ejectment on a demise of that date, consolidated with the present action, we must decide that question also; and it depends entirely upon this point,—whether, to the validity of an assignment of turnpike tolls, in the statutory form, not merely the production and notification to the clerk of a transfer, but its actual entry in the proper book, was necessary; for we are all of opinion that there was sufficient evidence of that production and notification, and to a proper clerk, on the 11th May of 1849, the day of the demise; but there having been no entry until the 18th of May following, the title was incomplete until that day, if the entry was a condition precedent.

This question must depend on the true construction of the 3 Geo. 4, c. 126, s. 81. That section gives a Form of transfer by an instrument not under seal (which Form has been followed in this case), and goes on to enact as follows:—“which transfer shall be produced and notified to the clerk or treasurer of the said trustees or commissioners, within two calendar months next after the day of the date there-

of, who shall enter the same in the said book or books, for which entry the said clerk or treasurer shall be paid the sum of five shillings and no more; and such transfer shall *then* entitle such assignee, his executors, administrators, and assigns, to the full benefit of such mortgage security; and every such assignee may in like manner assign or transfer the same, and so toties quoties; and it shall not be in the power of any person or persons, (except the person or persons to whom the same shall be last transferred, his, her, or their respective executors or administrators,) to release, discharge, or make void the original mortgage security, or the monies due thereon, or any part thereof." Now, if we read this clause as the established rule for the construction of statutes and other instruments requires, that is, according to the ordinary and grammatical sense of the words used, unless they lead to some absurdity or incongruity, the entry should be held to be a condition precedent; for it is said, that when the entry is made, *then* the transfer shall entitle the assignee to the full benefit of the mortgage security; and there is no inconvenience, much less absurdity, in making the validity of the title depend upon the act of the officer in entering the transfer; for the assignee may always procure this to be done; practically he is sure to be able to do it, and if the officer were to refuse he could compel him by mandamus; and until the entry is made the assignee is not bound to part with his purchase-money. There is no more inconvenience than under the Registry Act, in registering annuities, or the Ship Registry Act; and, on the other hand, there is a great advantage in having a regular deduction of title in the books of the trustees, which is more completely secured by making the validity of the title depend upon it as a condition, than by a mere directory provision to that effect.

We therefore think, that an entry in the book was essential to the validity of a title under the statutory assignment to the lessor of the plaintiff. Whether it would have been,

1850.

Don
d.
JONES
v.
JONES.

1850.

Don
d.
JONES
v.
JONES.

in case the transfer had been by deed, and so good at common law, or whether the entry would have been good, if not made within two months, are questions not necessary to be decided. We are of opinion, therefore, that the rule should be absolute as to the first demise.

Rule absolute accordingly.

Feb. 25. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY v. PILCHER.

To a declaration for railway calls the defendant pleaded, that, at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiff and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call

DEBT.—The declaration stated, that the defendant was and still is the holder of divers, to wit, 180, shares in the said Company, and being such holder, was and still is indebted to the said Company in a large sum of money, to wit, 300*l.*, in respect of a call made on the said shares, whereby &c., an action hath accrued to the plaintiffs, by virtue of the Companies Clauses Consolidation Act, 1845, and the Birkenhead, Lancashire, and Cheshire Railway Act, 1846, to demand from the defendant the said sum &c.

Plea, that, at the time when he the defendant first became and was the holder of the said shares, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the debts, causes of action, and liabilities, and each and every of them in the said declaration mentioned, have accrued to the plaintiffs, and been incurred by the defendant, as in the said declaration is alleged, and at the

upon the defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years. Replication, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years. It appeared at the trial, that the defendant was the purchaser of the shares in question whilst he was an infant, and that, after he was of full of age, a call was made:—*Held*, that the term "contract," meant the contract by which the defendant became a shareholder, and not the obligation to pay the calls under the 8 & 9 Vict. c. 16, s. 21, and, consequently, the plea was proved by evidence of his infancy, at the time of the transfer to him of the shares.

Quære, whether the word "contract," being so construed, the plea was an answer to the action.

time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the plaintiffs claim to be entitled by law to make the said call upon the defendant, and to demand and have the amount of the same of and from the defendant, in manner and form as in the said declaration is alleged, he the defendant was an infant, within the age of twenty-one years.—Verification.

Replication, that the defendant, at the time when he first became and was the holder of the said shares in the said declaration mentioned, and at the time of the making and entering into by him the defendant of the said contracts, and every of them in the said plea mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years, to wit, of the age of nineteen years. Conclusion to the country, and issue thereon.

At the trial, before *Maule*, J., at the Chester Summer Assizes, 1849, it appeared that the shares in question were transferred to the defendant as a purchaser, on the 16th of February, 1848, he being at that time an infant, and that he came of age on the 7th of April following. On the 20th of May, in the same year, there was a resolution for a call, which, on the 24th of May, was announced by a circular, addressed to every shareholder, requiring him to pay the amount on the 16th of June. On the part of the plaintiffs, it was submitted that the plea was not proved, inasmuch as the "contract" therein mentioned meant the obligation to pay the call, and that did not arise until after the defendant was of full age. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

A rule nisi having been obtained accordingly,

Welsby and *Townsend* shewed cause (Feb. 14).—The question is, to what "contracts" the plea and replication, taken together, must be construed to refer. The allegation

1860.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
PILCHER.

1850.

BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY CO.
 v.
 PILCHER.

in the declaration, that the defendant "is the holder of shares," means, that he was the holder at the time the call was made: *The Belfast &c. Railway Company v. Strange* (a). The plea must therefore be taken in the same sense, and as meaning that the defendant was an infant at the time of the contract by virtue of which the debt accrued; that is, the resolution of the directors that a call be made: *Ex parte Tooke* (b). Whether or no the defendant was an infant at an anterior period is therefore immaterial. The plea does not allege any repudiation by the defendant after he became of age. [They referred to *The Cork and Bandon Railway Company v. Cazenove* (c), *The Leeds and Thirsk Railway Company v. Fearnley* (d), *The Newry and Enniskillen Railway Company v. Coombe* (e).]

Willes and Brandt, in support of the rule.—The plaintiffs were bound by this issue to prove, that at the time the defendant became the *holder of the shares* he was of full age. [Parke, B.—Does the term "contract" mean the contract which the defendant entered into when he purchased the shares, or the obligation which the 8 & 9 Vict. c. 16, imposes in respect of calls? If the latter, the plea was not proved.] The 21st section of that Act enables the directors to enforce the contract made with the original subscribers, and when their shares are transferred, the contract is transferred; so that the effect of the statute is not to impose any new obligation upon a transferee of shares, but to enable the Company to enforce against him the original contract. The 7 & 8 Vict. c. 110, relates to the registration of persons who had contracted to subscribe, for the purpose of forming a joint-stock Company. The object of the 8 & 9 Vict. c. 16, was to incorporate such subscribers, and it provides for the transfer of shares, and enables the Company to call

(a) 1 Exch. 739.

(b) 18 L. J., Q. B., 343.

(c) 10 Q. B. 935.

(d) 4 Exch. 26.

(e) 3 Exch. 565.

for the money which the original subscribers had contracted to pay, in order to carry on the undertaking; so that the transferee becomes liable to pay in respect of the original contract, in the same way that the assignee of a lease is liable while he continues to hold the land. The making of the call creates no new obligation, but is only a condition precedent to the right to recover the sum originally subscribed for. [*Parke, B.*—The language of the statute is equivalent to saying, that every person who is a shareholder at the time of making a call, shall be bound to pay the call. But then, according to *Stowel v. Lord Zouch* (a), there is an implied exception in favour of persons incapable of contracting, from want of reason or the like.]

1850.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
PILCHER.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case came before us a few days ago, on a motion for a new trial. It was an action of debt for a call, alleged to be due to the plaintiffs from the defendant as the holder of 180 shares in the plaintiffs' Company, the call being made on the 16th of June, 1848. [His Lordship stated the pleadings, and proceeded.] On the trial it appeared, that on the 21st of May, 1848, there was a resolution for a call. On the 24th of May, a circular announcing it was addressed to all the shareholders, requiring the amount to be paid on the 16th of June. The transfer of the shares was made to the defendant as a purchaser, on the 1st of March, when he was an infant; he came of age on the 7th of April, 1848. On these facts, the question was, whether the plea was proved. That depends upon the meaning of the term "contract" in the plea. If it means the "contract" by which he acquired the shares from his

(a) Plowd. 353 a.

1850.

BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY CO.
v.
PILCHER.

vendor, there is no doubt he was then an infant, as well as at the time when he became a holder of the shares, and consequently the plea was proved. If, on the other hand, the term "contract" means the obligation to pay the calls created by the special Act establishing the railway, and the 8 & 9 Vict. c. 16, that obligation did not arise until the time fixed for the payment of the call, and then the defendant was of full age, and the plea was not proved. We think that this obligation, created by statute, cannot be described as a "contract," and consequently that the meaning of the plea is, that he was an infant when the contract was made by which he became a shareholder; and in that sense of the word the plea was proved, and the rule must therefore be absolute to enter a verdict for the defendant. Whether the plea is an answer to the declaration, the word "contract" being so construed, is a question which we need not now consider.

Rule absolute.

Feb. 15.

THOMAS v. THOMAS, Executrix, &c.

An action for money had and received will not lie by one tenant in common against his co-tenant, who has received more than his share of the profits.

ASSUMPSIT for money had and received to the plaintiff's use.—Plea, non assumpsit.

At the trial, before *Rolfe B.*, at the last Herefordshire Summer Assizes, it appeared that the plaintiff and one Benjamin Thomas, the defendant's late husband, were entitled, under the will of one Alice Thomas, to certain premises as tenants in common; but that Benjamin Thomas, for some time previously to his death, in February, 1848, received the whole rent. It was admitted that the plaintiff was entitled to half of the rent, as such tenant in common, and the present action was brought to recover the moieties of five years' rent. On the part of the defendant, it was objected that this form of action would not lie by

one tenant in common against his co-tenant ; and a verdict was taken by consent for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

1850.
THOMAS
v.
THOMAS.

Whateley and *W. H. Cooke* shewed cause (Feb. 7).—There is no objection to this form of action. At common law, the action of account lay only against a guardian in socage, a bailiff, or receiver: 2 Inst. 379; or as between merchants; but it lay not between tenants in common, unless he who was charged had been constituted bailiff: Co. Litt. 172. a., Com. Dig. "Accompt," (A 4), Arch. N. P. 196, Sel. N. P. 2. The 4 Anne, c. 16, s. 27, passed to enable one tenant in common to sue the other where he had not been appointed bailiff. It provides, that actions of account "*shall and may*" be brought by one tenant in common against the other, as bailiff, for receiving more than comes to his just share or proportion. That was an enabling statute, and did not deprive the parties of any other remedy they might have. In many cases an action of account and also of assumpsit will lie. It is laid down in Brooke's Abr. "Accompt," pl. 20, on the authority of the Year Book, 47 Edw. 3, 22, that if two are jointly possessed of a chattel, and one of them sells it, an action of account will lie against him for the other's share of the money. That position having been cited in *Wheeler v. Horne* (a), *Willes*, C. J., said, "I should think that not only an action of account, but even an action on the case for money had and received, might be well brought against him for it." In Viner's Abr. "Account," (A), pl. 12, there is cited a case of *Hamond v. Ward*, "which was error to reverse a judgment in an insimul computaverunt, and assigned that the action was brought against him for rent as tenant of the land, and not as receiver; and therefore, account did not lie; but *Rolle*, C. J., said, "It

(a) *Willes*, 208.

1850.
 THOMAS
 v.
 THOMAS.

appears here that the action is brought against the defendant as receiver; and if one receives my rents without my consent, I may have either debt or account against him; and affirmed the judgment." In *Wilkin v. Wilkin* (a), which was an action of assumpsit, the plaintiff declared "that the defendant intending to go beyond sea, he delivered him a box and goods, which the defendant promised to dispose of for him, and to give him an account thereof at his return. Defendant pleaded in abatement, that he was the plaintiff's bailiff, and merchandised the said goods, and that he ought to bring account, and not an action on the case, non allocatur; for, the action being grounded on an express promise, assumpsit lies as well as account, and the plaintiff has his election; et per *Holt*, there is some inconvenience in giving a long rambling account in evidence to a jury; but whenever one acts as bailiff, he promises to render account." *Dolben, J. (b)*—"Case lies, because an action of account is a tedious and troublesome action." The case was adjourned, and ultimately the Court gave judgment of respondeat ouster (c). In *Bacon's Abr. "Accompt," (C)*, citing *Brooke's Abr. "Accompt," pl. 35*, it is said, "An action of accompt lies not for a thing certain, as if a man delivers 10*l.* to B. to merchandise with, he shall not have account of the 10*l.* but of the profits, which are uncertain." In *Viner's Abr. "Account," (A)*, pl. 12, it is laid down, that "no account lies for rent reserved upon a lease for years," because it is a thing certain. [*Parke, B.*—There is this *Anonymous case* in 11 Mod. 92, which illustrates the subject:—"Powell, J.—If I give money to another to buy goods for me, and he neglects to buy them, for this breach of trust I shall have election to bring debt or account; and cited four or five cases. *Holt, C. J.*, contra.—If the party did not take it as a debt, but ad computandum, or ad merchandizandum, it must be an account,

(a) 1 Salk. 8; Shower, 71.

(b) Comb. 149.

(c) Carth. 89.

1850.
 THOMAS
 v.
 THOMAS.

and he shall have the benefit of an accountant, which is, he may plead being robbed, which shall be a good plea in the last case, but not in the first.”] In *Tomkins v. Will-shear* (a), *Gibbs*, C. J., says, “The use of the action of account is, where the plaintiff wants an account, and cannot give evidence of his right without it; but if, by subtracting the amount of six articles on the one side from the amount of nine articles on the other, the plaintiff can make out that a balance is due to him even of 50*l.*, it is impossible to say that the action of assumpsit will not lie for that balance.” Here no account is wanted, but the plaintiff’s claim is ascertained by taking half the annual rental for five years. *Goodtill v. Toombs* (b) decided that one tenant in common may maintain trespass for mesne profits, after a recovery in ejectment, against his co-tenant. That is a stronger case than the present, inasmuch as there the damages were unliquidated, and the jury might, if they thought fit, have given more than the amount of the rent. [They also cited *Sturton v. Richardson* (c), *Baxter v. Ho-sier* (d), and *Cottam v. Partridge* (e).]

Keating and Skinner, in support of the rule.—At common law one tenant in common could not maintain any action against his co-tenant, unless the latter were his bailiff. In Co. Litt. 200. b., it is said, “Although one tenant in common or joint tenant, without being made bailiff, take the whole profits, no action of account lieth against him, for in an action of account he must charge him either as a guardian, bailiff, or receiver, as hath been said before, which he cannot do in this case, unless his companion constitute him his bailiff. And therefore all those books which affirm that an action of account lieth by one tenant in common or joint tenant

(a) 5 Taunt. 431.

(b) 3 Wils. 118.

(c) 13 M. & W. 17.

(d) 5 Bing. N. C. 288.

(e) 4 M. & G. 271.

1850.
 THOMAS
 v.
 THOMAS.

against another, must be intended when the one maketh the other his bailiff, for otherwise never his bailiff to render an account is a good plea." Com. Dig. tit. "Estates by Grant," (K 8), and Cruise's Dig., tit. 20, s. 9, are authorities to the same effect. There is good reason why an action for money had and received will not lie by one tenant in common against his co-tenant; for, in the first place, there is no privity between them. In *Clarence v. Marshall* (a), Bayley, B., speaking of that form of action, says, "Now that is a species of action in which, if you establish agency clearly, why then you may treat the rents received by your agent as so much money received for your use, but you must make out most clearly that an agency subsisted in point of fact before you can maintain an action for money had and received, which is not an action in which rents received under an adverse holding or possession are recoverable by the rightful owner." A further objection to that form of action is, that it would deprive the co-tenant of his right to deductions, which would be allowed in an action of account. Again, if the receipt by one tenant in common of his companion's share of the profits raised an implied assumpsit, the title to the land might be put in issue in an action for money had and received. *Eason v. Henderson* (b) shews that the only remedy is by action of account.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—The question in this case is, whether an action for money had and received lies by one tenant in common against his companion. On the argument, the authorities on the subject on both sides were cited.

It appears to us to be clear, from Co. Litt. 200. b., that

(a) 2 C. & M. 495.

(b) 18 L. J., Q. B., 69.

1850.
 THOMAS
 v.
 THOMAS.

by the common law a tenant in common could bring no such action as this. In that page several cases are put in which one tenant in common may bring an action against his companion; but it is there said, that if two be tenants in common of a chattel, and one of them takes it away, the other has no remedy by action, except when the subject-matter is destroyed, but must watch his opportunity to retake it. Several other instances are there put, illustrative of these distinctions; and it is expressly laid down, that no action of account lay by the common law by one tenant in common against his companion for taking more than his share of the profits, unless where he had constituted him his bailiff to receive them. Now this want of remedy by the common law was provided for by the stat. 4 Anne, c. 16, s. 27, which enables one tenant in common to maintain an action of account against the other as bailiff, for receiving more than his due share or proportion; in which case, however, he is entitled to all the rights and indemnities of a receiver, and consequently would be able to shew that the money had been lost without his fault; whereas, in an action for money received to the use of another, the defendant is liable for the money absolutely. It is clear, therefore, that the statute of Anne only gives an action of account, in which the receiver would be entitled to all just allowances; and if so, that this action for money had and received will not lie.

A question occurred to my mind, which I thought worthy of consideration, namely, whether this action might not lie, on the principle that, where there are tenants in common of a reversion (as, for instance, of a reversion of land let on lease), they may either join in their action for rent, or bring several actions. If a tenant in common can recover a moiety of the rent (as, for instance, supposing the rent to be 40*l.*, that he could recover 20*l.*) there might be a colour for saying that the other could sue him for half of a whole amount wrongfully received. But that is explain-

1850.
 THOMAS
 v.
 THOMAS.

ed by Lord *Holt*, in *Midgley v. Lovelace* (a) and *Martin v. Crompe* (b). He says, that where a tenant in common severs in such an action, he cannot recover half the sum *nomina- tim*, but only half of the rent; thus shewing that the rent continues unsevered.

It appears to us, therefore, that the case of a tenant in common who receives the whole of the rent due to himself and his companion is analogous to the case of a tenant in common taking the whole of a chattel into his possession; in which case neither trespass nor trover lies against him. The plaintiff's only remedy here is therefore by action of account, and this rule must be made absolute.

Rule absolute.

(a) Carth. 289.

(b) 1 *Ld. Raym.* 340.

Feb. 8.

MEDLICOTT v. HUNTER.

The Court refused to amend the indorsement on a pluries writ of summons by making the day of the date of the first writ conformable to the fact, although the debt would otherwise be barred by the Statute of Limitations.

THIS was a rule calling on the defendant to shew cause why the plaintiff should not be at liberty to amend the indorsement on the last pluries writ of summons issued in this cause, by inserting the date of the first writ of summons.

It appeared that the first writ of summons issued on the 20th August, 1846, and on the 21st December, in the same year, was returned non est inventus, and entered of record according to the provisions of the 2 Will. 4, c. 39, s. 10. This writ was continued by alias and pluries writs, which were also entered of record, the last of which issued on the 18th February, 1848, and upon which the defendant's attorney gave an undertaking to appear. This writ contained an indorsement that the first writ of summons was dated the 21st August, 1846. The action was on promises, and the defendant pleaded the Statute of

Limitations; to which the plaintiff replied, that the cause of action did accrue within six years, upon which issue was joined. The issue delivered stated that the defendant had been summoned to appear by virtue of a writ issued on the 20th August, 1846. In Trinity Term, 1849, the defendant obtained a rule absolute to amend the issue, by inserting the date of the 18th February, 1848, as the commencement of the action, instead of the 20th August, 1846, which was accordingly done. The plaintiff thereupon obtained the present rule; against which

1850.
 MEDLICOTT
 v.
 HUNTER.

Bovill shewed cause, in last Michaelmas Term (Nov. 26).—The 2 Will. 4, c. 39, s. 10, expressly declares, that no second or subsequent writ of summons shall be available unless it contains the required indorsement at the time the copy is served. This Court has decided that such is the construction of the statute: *Walker v. Collick* (a). In *Campbell v. Smart* (b), the Court of Common Pleas refused to allow the dates of writs of summons to be altered, for the purpose of preventing the plaintiff's claim from being barred by the Statute of Limitations. [*Parke, B.*—In *Culverwell v. Nugee* (c), this Court amended alias and pluries writs of summons by indorsing thereon the day of the date of the first writ of summons and return thereto; but that decision was given with reference to such amendments as could be made at common law. Since, however, it has been decided that the indorsement must be on the writ at the time of service, there is less reason for allowing the amendment.]

Hugh Hill, in support of the rule.—In *Walker v. Collick* (a), the alias writ did not contain any indorsement; here the object of the amendment is to make the date conformable to the truth. That decision is no authority that the indorsement must be on the writ at the time of ser-

(a) 4 Exch. 171.

(b) 5 C. B. 196.

(c) 15 M. & W. 559.

1850.
MEDLICOTT
v.
HUNTER.

vice, but only that it must be proved at the trial, that the requisites of the statute have been complied with. The defendant will not be prejudiced by the amendment, as the objection may still be taken at the trial, and the question as to the construction of the statute carried to a court of error by bill of exceptions. A similar amendment was allowed by this Court, in *Williams v. Williams* (a), and that authority was acted on in *Mavor v. Spalding* (b).

Cur. adv. vult.

PARKE, B., now said:—In this case, the first writ of summons issued on the 20th of August, but in the indorsement on the subsequent writ to save the Statute of Limitations, it was stated to have issued on the 21st. We are all of opinion that we cannot alter the indorsement, because, by the terms of the statute, the indorsement must be on the writ at the time of service; and therefore we cannot, although to save the Statute of Limitations, afterwards make a new indorsement.

Rule discharged.

(a) 10 M. & W. 476.

(b) 1 D. & L. 878.

1850.

PARRY v. THOMAS.

Feb. 15.

TRESPASS quare clausum fregit.

Pleas. — First, not guilty. Secondly, not possessed. Thirdly, that the place in which &c., long before and at the said several times when &c., hath remained and been, and still is, part of a certain parcel of land, consisting of divers, to wit, 200 acres of land, called Common Wood, situate in the borough of Holt, in the county of Denbigh. That the town and borough of Holt, in the county of Denbigh, for a long time before and at the time of the making of the grant hereinafter mentioned, and thence continually until and at the said several times when &c., was and still is an ancient town and borough; and that the said town and borough of Holt, long before and at the time of the making of the grant hereinafter mentioned, and thence continually until and at the said several times when &c., formed part of and was within the lordship of Bromfield, in the marches of Wales; and that the burgesses of the said town and borough, from time whereof the memory of man is not to the contrary, and thence for a long time, to wit, until and at the said several times when &c., were and still are a body politic and corporate, by the name of the Burgesses of the Town of Holt, and by the said name were used to plead and be impleaded. That heretofore &c., upon the Monday then next after the Feast of St. Andrew the Apostle, in the thirteenth year of the reign of the Lord Henry the Fourth, late King of

To trespass quare clausum fregit, the defendant pleaded that the locus in quo was in the borough of H., which was an ancient borough, and that the burgesses thereof were a body corporate by the name of the Burgesses of the Town of H.; that the Earl of A., being seized in fee of certain land, whereof the locus in quo was part, by charter granted to the burgesses of the town of H., their English heirs and successors, and their tenants, common of pasture in the said land for all their cattle within the town of H., levant and couchant. The plea then stated, that the defendant was a burgess of H., and an English successor of the burgesses of H., to whom the

grant was made, and, as such burgess and English successor, ought to have common of pasture for his cattle levant and couchant within the borough of H.; wherefore he placed his cattle there, which was the trespass complained of. Replication, that the defendant ought not to have common of pasture for his cattle levant and couchant, within the borough of H., modo et formâ:—*Held*, that the replication only put in issue the fact of the defendant having such right of common as was stated in the plea; and therefore the plaintiff could not give evidence that the right of common was extinguished by proceedings under the Inclosure Act, 8 & 9 Vict. c. 118; but he ought to have shewn in what way the grant ceased to operate, by replying the facts specially.

Held, also, that the plea was bad, inasmuch as it alleged a grant to the Corporation of H. in their corporate capacity, and not for the benefit of the individual burgesses.

1850.
PARRY
v.
THOMAS.

England, Thomas Earl of Arundel and Surrey, Lord of Bromfield and Yale, in the marches of Wales, was seised in his demense as of fee of and in the said lands called Common Wood, whereof the said close in which &c. was and is part; and the said Thomas Earl of Arundel and Surrey then being so seised thereof as aforesaid, and then having full power and authority in that behalf to make the grant hereinafter mentioned, and the said burgesses of the town of Holt then having full right, power, and capacity in that behalf to accept, receive, and take the same, the said Thomas Earl of Arundel and Surrey then, to wit, on &c., by a certain charter, sealed with his seal, and date whereof is the day and year last aforesaid (excuse of profert), did grant to the burgesses of the said town of Holt, their English heirs and successors, and their tenants, common of pasture in the said parcel of land called Common Wood, for all their cattle within the said town of Holt levant and couchant, with free ingress and egress for the same, to hold to the said burgesses, their English heirs and successors, and their tenants several, at all times of the year. The plea then stated, that the defendant was and is a burgess of the said town and borough of Holt, and an English successor of the said burgesses of the said town of Holt, to whom the said grant of the said common of pasture in the said lands called Common Wood was so made by the said Thomas Earl of Arundel and Surrey, as aforesaid; and "as such burgess and English successor, at the said several times when &c., ought to have had and enjoyed common of pasture for his said cattle levant and couchant within the said town and borough of Holt, at his free will and pleasure, in, upon, and throughout the said lands called Common Wood." Wherefore the defendant, as such burgess and English successor, at the said several times when &c., placed his cattle in the said lands &c., as he lawfully might &c., quæ sunt eadem.—Verification.

Replication, that the defendant, at the said several times when &c., ought not to have had and enjoyed common of pasture for his said cattle levant and couchant, within the said town and borough of Holt, at his free will and pleasure, in, upon, and throughout the said lands called Common Wood, modo et formâ, &c.; upon which issue was joined.

At the trial, before *Maule, J.*, at the Denbighshire Summer Assizes, 1849, the plaintiff's counsel proposed to give evidence of certain proceedings under the General Inclosure Act, 8 & 9 Vict. c. 118, by which it was submitted the right of common had been extinguished. This evidence was objected to on the part of the defendant, but admitted by the learned Judge, subject to the opinion of the Court. Upon the evidence, his Lordship thought that there was no extinguishment of the right of common, because it came within the exception of the 12th section, it not being a stinted common. A verdict was found for the plaintiff on the first and second issues, and for the defendant on the third.

Welsby, in the following Michaelmas Term, obtained a rule nisi for a new trial, on the ground of misdirection, or for judgment non obstante veredicto on the third plea; and a cross rule was obtained, to enter a verdict for the defendant on the ground of the improper reception of the evidence; which rules were argued (February 14) by

Martin, Townsend, and *E. Bevan*, for the defendant.—First, under this replication, which improperly traverses matter of law, the plaintiff was not entitled to give in evidence new affirmative matter, shewing that the right of common was extinguished. The only point in issue was, whether the defendant, as such burgess, had a right of common of pasture for his cattle levant and couchant; and if the plaintiff relied upon the fact of the grant having ceased to operate, he should have replied specially, shewing in what way it was put an end to.

1850.
PARRY
v.
THOMAS.

1850.
 PARRY
 v.
 THOMAS.

Secondly, The plea is good. It contains the words for want of which the plea in *Mellor v. Spateman*(a) was held bad. [Parke, B.—There the prescription was by the burgesses “for themselves and every burgess of the borough.”] Here the grant is to the burgesses “and their tenants,” which shews that it was intended to be a personal benefit to the burgesses, and not merely to them in their corporate capacity(b).

Welsby and Foulkes, for the plaintiff.—Under the traverse taken by the replication, it was competent for the plaintiff to give in evidence facts shewing that the right of common was extinguished. Courts of justice discourage unnecessary prolixities in pleading: 1 Wms. Saund. 103 c., n. 3. Perhaps the replication might have been bad on special demurrer, as an argumentative traverse of the title alleged in the plea; but the defendant having joined issue upon it, if any one step in the title be disproved by the plaintiff's evidence, the whole must fail. A prescription, which is only a grant before the time of legal memory, may be traversed by the general replication; so also a prescriptive claim under the 2 & 3 Will. 4, c. 71. [Parke, B.—How do you distinguish this case from that of *The Bishop of Meath v. The Marquis of Winchester*(c)?] That was a quare impedit, in which the plaintiff, after tracing his title through various steps, alleged that he thereby became possessed of the advowson, and the defendant, under a denial of the plaintiff's possession, sought to give in evidence mere collateral matter, viz. a fine of the advowson levied by one whose estate the plaintiff had.

Then, with respect to the plea—it is bad for not shew-

(a) 1 Saund. 343.

(b) They also argued that the right of common was not extinguished by the proceedings under the 8 & 9 Vict. c. 118, inasmuch

as the case fell within the 12th section; but, as the Court gave no opinion on that point, the arguments are omitted.

(c) 3 Bing. N. C. 183.

ing that the individual burgesses were entitled to the right of common under that grant to the Corporation. It should have been pleaded as a grant to the Corporation, by name, for the benefit of the burgesses, and still subsisting in the burgesses; in which case, according to the authority of *Mellor v. Spateman*, it might have been enjoyed by the burgesses in their individual capacity. A corporation aggregate cannot take lands by their corporate name to them and their heirs, but only to them and their successors. Com. Dig. "Franchises," (F 16) n. (i); Co. Litt. 94. b. The plea is inconsistent and repugnant; it first alleges a grant which could only be enjoyed by the Corporation in their corporate capacity, and it then states that the right is to be enjoyed by burgesses individually.

1850.
PARRY
v.
THOMAS.

Cur. adv. vult.

PARKE, B., now said (after stating the pleadings):—Upon the issue on the third plea, it was proposed by the plaintiff to shew (and the point was reserved for the consideration of the Court), that the right of common had ceased by reason of an inclosure, made by the inclosure commissioners under the 8 & 9 Vict. c. 118. We yesterday intimated an opinion, that that question was not admissible under this replication, which only puts in issue the fact of the defendant having a right of common in the manner described in the plea; that this being a claim by grant, and not by prescription, the plaintiff ought to have shewn in what way that grant had ceased to operate, by replying, that it had been put an end to by the act of the commissioners, under the 8 & 9 Vict. c. 118. Consequently, as the evidence was inadmissible, it becomes necessary for us to consider whether the commissioners had power or not under that statute to inclose this common, it being alleged that it was not a stinted common, in which case only the commissioners had power.

Then a motion was made for judgment non obstante

1850.
PARRY
v.
THOMAS.

veredicto, on the ground that it does not appear by the plea that the defendant had any right of common, inasmuch as the grant was to the Corporation, and not to the individual burgesses constituting the Corporation. Now, that is somewhat obscure, from the allegation that the grant was made "to the burgesses of the town of Holt, their English heirs and successors" (which are words not very intelligible), "for all their cattle levant and couchant in the said town of Holt." The question is, whether upon that allegation we can see that the meaning of the plea is, that the grant was made to the Corporation of Holt, for the benefit of the individual burgesses, or whether it was simply a grant of an incorporeal hereditament to the Corporation, as a corporation. We cannot come to the conclusion that the former is the meaning of the grant. It is very probable, looking at the peculiar terms of this grant, and considering also the fact of enjoyment, shewn by the evidence, that if the defendant had pleaded this as a grant made to the burgesses in their corporate character, for the use of the burgesses of the borough, such a plea would have been supported. In *Mellor v. Spateman*, it was averred that the Corporation of Derby time out of mind had been used and accustomed to enjoy the right of common for their burgesses, the several burgesses of the borough. So here, if the averment had been that Lord Arundel granted rights of common to the burgesses of the borough of Holt, for the burgesses and their tenants, the defendant being a burgess, the plea would have been good; and I think that if they had so pleaded it, the evidence would have supported that allegation. We cannot collect upon the face of this plea, that this was a grant to any body but the Corporation, so that they might have granted the right of common to some one else, and were not bound to hold it for the burgesses. Therefore, the plea is bad, and the plaintiff is entitled to judgment non obstante veredicto.

Judgment for the plaintiff.

1850.

BUCKLEY v. HANN.

Feb. 8.

THIS was a rule calling on the plaintiff to shew cause why a suggestion should not be entered on the roll, to deprive the plaintiff of costs, under the London Small Debts Act, 10 & 11 Vict. c. lxxi (a).

It appeared from the affidavits, that the action was by the indorsee against the acceptor of a bill of exchange, drawn by one E. Wood, and by him indorsed to the plaintiff, and was tried before the Secondary of London, under a writ of trial, when a verdict was found for the plaintiff

A clerk in the Admiralty, who, as such, attends daily at an office within the city of London, is not a person who "carries on his business" there within the London Small Debts Act, 10 & 11 Vict. c. lxxi.

A bill of exchange was drawn and accepted, and the indorser put his name upon it, within the city of London, but it was delivered to the indorsee in the county of Middlesex:—*Held*, that the cause of action did not arise within the city of London.

(a) The following sections were referred to:—

Sect. 40. "That such summons may issue, provided the defendant, or one of the defendants, shall dwell or carry on his business within the city of London or the liberties thereof at the time of the action brought; or provided the defendant, or one of the defendants, shall have dwelt or carried on his business therein at some time within six calendar months next before the time of the action brought; or if the cause of action arose therein."

Sect. 112. "That all actions and proceedings which before the passing of this Act might have been brought in any of her Majesty's superior courts of record, where the plaintiff dwells more than twenty miles from the defendant, or where any officer of the court holden under the provisions of this Act shall be a party, except in respect of any claim to any goods and chattels taken in execution of the process of the court, or the proceeds or value

thereof, may be brought and determined in any such superior court, at the election of the party suing or proceeding, as if this Act had not been passed."

Sect. 113. "That if any action shall be commenced after the passing of this Act in any of her Majesty's superior courts of record, for any cause other than those lastly hereinbefore specified, for which a plaint might have been entered in the court holden under the provisions of this Act, and a verdict shall be found for the plaintiff for a sum not more than twenty pounds if the said action is founded on contract, or less than five pounds if it be founded on tort, the said plaintiff shall have judgment to recover such sum only, and no costs; and if a verdict shall not be found for the plaintiff, the defendant shall be entitled to his costs as between attorney and client, unless in either case the Judge who shall try the cause shall certify on the back of the record that the action was fit to be brought in such superior court."

1850.
 {
 BUCKLEY
 v.
 HANN.

for 12*l.* 4*s.* The defendant, who resided at Greenwich, in the county of Kent, was a clerk in the Admiralty, and, as such clerk, daily attended at the office called "The General Register and Record Office of Seamen," No. 70, Lower Thames-street, in the city of London, and he had no other occupation or business. The plaintiff resided at Edmon-ton, in the county of Middlesex, and the bill in question was drawn and accepted, and Wood put his name upon it, at the office No. 70, Lower Thames-street, and it was then sent by a messenger to the residence of the plaintiff, who received it there.

J. Brown, in last Michaelmas Term, (November 26) shewed cause.—First, the defendant did not carry on his business within the city of London. A clerk, who merely attends at an office in the city, cannot be said to "carry on his business" there, within the meaning of the 10 & 11 Vict. c. lxxi. The word "business" is used in its popular sense, as denoting "trade or business," and it is evident, from the word "dwell," that the meaning of the statute is, that if the defendant shall not reside within the city, it shall be sufficient if he carries on his trade or business there. The words of the London Court of Requests Act, 39 & 40 Geo. 3, c. civ, were, "residing or inhabiting within the city of London or the liberties thereof, or keeping any house, warehouse, shop, shed, stall, or stand, or *seeking a livelihood*, or trading or dealing within the same city or liberties;" and it was held, that a clerk in the Excise Office, who attended at the office in the city for certain hours every day, and who had no other means of obtaining his livelihood, was not a person "seeking a livelihood" in the city, within the meaning of that Act: *Smith v. Hurrell* (a). In *Rolfe v. Learmouth* (b), the Court of Queen's Bench held, that the deputy-sealer of writs in

(a) 10 B. & C. 542.

(b) 19 Law J., Q. B., 10.

the Court of Chancery, whose duty it was to attend the Lord Chancellor when sitting at Westminster, and affix the Great Seal to instruments, was not a person carrying on his business at Westminster, within the meaning of the County Court Act, 9 & 10 Vict. c. 95.

1850.
BUCKLEY
v.
HANN.

Secondly, under the 10 & 11 Vict. c. lxxi, the *whole* cause of action must arise within the city of London, which is not the case here. In that respect the 10 & 11 Vict. c. lxxi, differs from the 9 & 10 Vict. c. 95, s. 128, the words of which are, "or where the cause of action did not arise wholly, *or in some material point*, within the jurisdiction of the court," &c. This bill was drawn and accepted within the city of London, but was delivered to the plaintiff in the county of Middlesex. There was no complete indorsement until delivery: *Marston v. Allen* (a).

W. L. Thomas, in support of the rule.—It is sufficient if any part of the cause of action arose within the city of London. There is a *prima facie* case which will justify the entry of a suggestion, which may be afterwards traversed: *Butler v. Corney* (b). The defendant had no other occupation, and performed all the duties by which he gained his livelihood within the city of London.

PARKE, B.—The statute requires the cause of action, that is, the whole cause of action, to arise in the city. In this case it did not: until the bill was *delivered* to the plaintiff, no cause of action arose from the indorsement to him. Upon the other point we will take time to consider.

Cur. adv. vult.

PARKE, B., now said:—This was an application to enter a suggestion to deprive the plaintiff of costs, and the case depends upon the meaning of the term "carry on business," in the London Small Debts Act, 10 & 11 Vict. c. lxxi, ss. 40,

(a) 8 M. & W. 494.

(b) 2 Exch. 474.

1850.

BUCKLEY
v.
HARR.

113. The question was, whether a clerk in the Admiralty, whose duty it was to attend at a place in the city in that department, was a person carrying on business within the limits of the city. A similar question has been under the consideration of the Court of Queen's Bench, with respect to the County Courts Act, 9 & 10 Vict. c. 95, and they have held, that the deputy sealer of writs in the Court of Chancery is not a person who carries on his business in any definite locality. In like manner, it cannot be considered that a clerk who attends at an office in the city carries on some independent business there, so as to be within the meaning of the Act in question. The rule will therefore be discharged.

Rule discharged.

Feb. 11.

MOSS v. HALL AND WIFE.

To an action on a bill of exchange by the indorsee against the executrix of the drawer, the defendant pleaded, that after the bill became due, and in the lifetime of the drawer, it was agreed between the plaintiff, then the holder of the bill, and the acceptor,

without the authority or consent of the drawer, "that, for a good and sufficient consideration in that behalf, that is to say, that in consideration that the said J. O. (the acceptor) would, during a certain reasonable time, to wit, during the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by the plaintiff if satisfactory to him, in lieu and substitution and for and on account of the said bill, he the plaintiff would, for and during the period aforesaid, abstain from and forbear enforcing payment from J. O. of the said bill by proceedings at law or otherwise." The plea then averred, that in pursuance of the said agreement, the said J. O. did during the said period use his best endeavours, &c., and concluded by alleging, that the plaintiff gave time to the acceptor without the consent of the drawer; and that the drawer had never ratified the agreement.—Verification. Replication, *de injuriâ*.—*Held*, on general demurrer, that the plea disclosed a sufficient consideration for the holder's promise to suspend the action against the acceptor, and that the surety was thereby discharged:—*Held*, also, on special demurrer, that the replication *de injuriâ* to this plea was bad.

1850.

Moss
v.
Hall.

holder of the said bill, and the said James Osborne the acceptor, without the authority or consent of the said W. Vanderstean, that for a good and sufficient consideration in that behalf, that is to say, that the said James Osborne would, during a certain reasonable time, to wit, during the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by the plaintiff, if satisfactory to him, in lieu and substitution and for and on account of the said bill, he the plaintiff would, for and during the period aforesaid in this plea mentioned, abstain from and forbear enforcing payment from the said James Osborne of the said bill in the first count mentioned, by proceedings at law or otherwise; and that, in pursuance of the said agreement, the said James Osborne did, during the period last aforesaid, namely, in the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange, to be taken by the plaintiff, if satisfactory to him, in lieu and substitution, and for and on account of the said bill. The plea then averred, that the plaintiff, without the consent or authority of W. Vanderstean, gave time to the said James Osborne, to wit, for the period aforesaid, for the payment of the said bill, and that the said W. Vanderstean never ratified the said agreement.—Verification. Replication, *de injuriâ*. Special demurrer.

The plaintiff, in his points for argument, stated he should contend that the plea was bad.

The demurrer was argued in last term (January 18) by

Lush, in support of the demurrer.—The replication is clearly bad. The plea does not set up any excuse for non-payment by the defendants. The subject matter of the defence, as it appears, arose after the bill had become due and payable. It therefore does not set up matter in excuse for the breach of the promise, but is in the nature of a discharge.

1850.

MOSS
v.
HALL.

H. Hill, contra.—The replication cannot be defended; but then the question arises, whether the plea is good. It is bad, on the ground that it does not state any sufficient consideration for the supposed agreement. The agreement, therefore, was not binding upon the principal, and the surety was not released by it. Thus, in *Philpot v. Briant* (a), where the executor of the acceptor of a bill of exchange orally promised to pay the holder out of his own estate, provided the holder would forbear to sue, and, in consequence of that arrangement he did forbear, it was held that, the promise being void, the drawer of the bill was not thereby discharged. Many other authorities might be adduced, which are founded upon that principle. [*Parke*, B.—The consideration might be sufficient, if the party agreed to take *substantial* trouble in obtaining a new negotiable instrument, and not merely to lie by. In such case *personal* trouble would be the consideration.]

Lush, in reply.—The plea is good. The question is, whether the plea, upon general demurrer, states a binding agreement. Now it is clear that, in an action upon an agreement, the consideration is sufficient to support the action, where a benefit is conferred upon the defendant, or the plaintiff is put to any inconvenience or trouble. Unless, therefore, it distinctly appears upon this plea that the consideration alleged had no such operation, the plea is good. A fresh negotiable bill may be of great benefit to the one party, and the other party may be put to great trouble in endeavouring to obtain it. The Court cannot say that, under all circumstances, this consideration, and, consequently, the agreement, is a mere nullity.

The Court recommended the plaintiff to amend, and the case stood over to give him that opportunity. But

(a) 4 Bing. 717.

on a subsequent day the plaintiff's counsel stated that the plaintiff would take the opinion of the Court upon the question. The case of *Ford v. Beech* (a) was referred to. And now—

1850.
Moss
v.
Hall.

PARKE, B. (after stating the pleadings,) said:—The replication was admitted to be bad by the plaintiff's counsel, on the argument of the case; and the question is, whether the plea is good. We are of opinion that it is. We must assume that the plea does not contain merely a promise or assurance on the part of the acceptor that he would use his best endeavours to procure a new and approved negotiable bill, but a positive contract to that effect; and as there is such a positive contract, the question is, whether there is any sufficient consideration alleged to make that a binding contract. The law is perfectly settled, that a binding agreement, founded upon a good consideration, for the breach of which an action would lie, entered into by a person with the principal, by which the latter is discharged, discharges the surety also. The question is, whether any such binding agreement is stated in this plea. Now, if the nature of the transaction was such as one is led to suspect it was from the plea, it is highly probable that the jury would negative any such contract. But supposing the contract to have been that which is here pleaded, then comes the question, whether the fact of the acceptor's agreeing with the holder of the bill, that he the acceptor would take trouble in order to obtain a fresh negotiable bill of exchange, although of a smaller amount, would constitute a sufficient consideration upon which to found a binding agreement between those parties. We are of opinion that it does constitute a sufficient consideration. The trouble which a party imposes upon himself may be a good consideration for a promise, and it is not for us

(a) 17 L. J., Q. B., 114.

1850.

Moss
v.
Hall.

to estimate whether the bargain was a good one or not. An engagement by a person to remunerate the act of another, which benefits the former or puts the latter to any inconvenience or loss, is a binding engagement. We were referred to the case of *Ford v. Beech*, which decides that an agreement to suspend an action is no answer to it. And that is so; but this is not an agreement to suspend the action against the defendant himself, but it is an agreement to give time to the principal, namely, to suspend the action against him; and whenever a party's hands are effectually tied up, so that he cannot break such an engagement without being made liable for a breach of it, the surety is discharged, the rule being, that there must be either a new security given to extend the time, or a binding agreement, upon a sufficient consideration, to suspend the remedy. In this case the surety is discharged; and, as we are of opinion that the plea is good, our judgment must be for the defendant.

Judgment for the defendant.

Feb. 13.

HITCHINGS v. THOMPSON and HOWARD.

The payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evidence as against the tenant of the principal's title, although the agent do not disclose his principal's name at the time.

REPLEVIN.—Avovery by the defendants, alleging that the plaintiff was tenant to them of the house in which the distress was made. Plea in bar, non tenuit.

At the trial, before *Cresswell*, J., at the last Bristol Summer Assizes, it appeared that the distress for rent was levied on the 11th of July, 1847, in a house in the occupation of the plaintiff; that the house originally belonged

Where A. had paid rent to B., the agent of C. & D., and the property for which the rent was paid was subsequently conveyed to C. & E., and A. still paid the rent to B., but was not informed by the latter of the change, and B. paid over the rent to C. & E.:—*Held*, that the payment so made was some evidence of the title of C. & E. to the property, and that, under such circumstances, there was no necessity (in an action of replevin by A. against parties claiming under C. and E.) for the proof of the conveyance to C. & E.

to one W. Clarke, who conveyed it upon his marriage to Messrs. Ward and Baynton, as trustees of the settlement. The plaintiff then endeavoured to shew, that Baynton having withdrawn from the trusteeship, a Mr. Newman was, by a deed of the 21st of February, 1846, appointed in his place; but the execution of this deed was not proved. Ward and Newman afterwards retired from the trusteeship, and the legal estate in the house was conveyed by the latter trustees to the present defendants. The plaintiff paid the rent to a Mr. Horwood, the receiver and agent of Messrs. Ward and Baynton, and Ward and Newman, during their respective trusteeships. The plaintiff had, on the occasion of each payment, obtained receipts from Horwood in the following form:—

1850.
 HITCHINGS
 v.
 THOMPSON.

“Received, for the trustees of Mr. and Mrs. W. Clarke, of Mr. Hitchings, 5*l.* 5*s.*, being for half a year’s rent for the house and premises situate in the parish of St. Philip and Jacob, Bristol, due, &c.

“DANIEL HORWOOD.”

Horwood had paid the money over to Messrs. Ward and Baynton, and Ward and Newman, but the plaintiff did not know of the change of the trustees, or that Horwood was agent for all of them. It was thereupon contended, on behalf of the plaintiff, that the defendants had failed to shew that he was tenant to them, inasmuch as there was no evidence of the transfer of the property to Ward and Newman. The learned Judge being of such opinion, directed the jury to that effect, and the plaintiff obtained a verdict, with 4*l.* 4*s.* damages.

Cockburn, in Michaelmas Term last, obtained a rule nisi for a new trial, on the ground of misdirection, and contended, that as the plaintiff had paid rent to an authorised

1850.
 HITCHINGS
 v.
 THOMPSON.

agent of the defendants, he was estopped from denying their title; and he cited *Gouldsworth v. Knights* (a).

Butt and *Kingdon* now shewed cause.—The direction was correct. It appeared by the evidence adduced on behalf of the defendants, that the title to the property in question was vested in Messrs. Ward and Baynton; and as it was not proved to have passed to Messrs. Ward and Newman, it is to be presumed that the estate remained vested in the first trustees. The defendants therefore failed to shew any title in themselves. The receipts given were merely for the trustees of Mr. and Mrs. Clarke, and the plaintiff was neither aware of, nor did he recognise, the change of the trustees. [*Rolfe*, B.—There was no evidence that the plaintiff paid the rent for the first set of trustees only. He paid it to Horwood for the trustees, whoever they might happen to be at the time of the payment. *Alderson*, B.—The transaction amounts to this: the plaintiff pays the agent the rent, implying at the same time that it is of no importance to him who the trustees may be, provided the agent pays the amount over to the party really entitled to it. Receipt of rent is some evidence of title.]

Cockburn and *M. Smith*, in support of the rule, were not heard.

PARKE, B.—The rule must be made absolute. I think that there was evidence in this case that the plaintiff held the premises upon which the distress was made, as tenant to the defendants, Thompson and Howard. It was proved that Mr. Horwood received certain sums of money from the plaintiff as rent for Messrs. Ward and Baynton, and subsequently other sums for rent; and the defendants, in order

1850.
 HITCHINGS
 v.
 THOMPSON.

to obtain the verdict, were bound to shew that they were entitled to this rent, on account of which the distress was made. The terms of the holding are not disputed, and the only question is, whether the defendants made out a sufficient title in this case to receive the rent. It has been urged, on the part of the plaintiff, that Mr. Horwood did not inform the plaintiff upon whose account he received the rent. If, however, Ward and Newman had distrained for rent, the receipt of previous rent by Horwood, as their agent, on their account, would be some evidence of their title, although he did not disclose their names to the plaintiff. Here there is some evidence that Ward and Newman were entitled to the rent, and the question is, whether the fact that the plaintiff had paid rent to Ward and Baynton makes any difference. That only affects the weight of the evidence, for it was competent to the plaintiff to have shewn that the payment had been made upon the supposition that it was to go to Ward and Baynton, to whom it had been paid before, since every payment which is made by a tenant under a mistake or in ignorance of the party's title to whom he has paid it, may be shewn by him to have been so made. The plaintiff might dispute the fact of the assignment of the reversion as having been made by fraud. Upon the proof of the payment to Ward and Newman, the plaintiff would be at liberty to shew that Ward and Baynton were the persons he intended to receive it. But he did not do so; and then there was evidence that Mr. Horwood was the person duly authorised to receive the rent for Ward and Newman. That being so, there was evidence in this case—I do not say more than that—but there was some evidence to support the avowry, although the plaintiff did not know, at the time the payments were made to the receiver, the fact that the title to these premises had passed to the second set of trustees.

ALDERSON, B.—I am of the same opinion. The payment

1850.
HITCHINGS
v.
THOMPSON.

of rent, and the terms under which the plaintiff held, having been proved in this case, the only question is, under which of the two landlords he held. There was a conveyance of the premises to the present defendants by Ward and Newman, and if they had the power to convey, the defendants are the proper parties to receive the rent. The question, therefore, is, whether payment of rent to an agent who has not disclosed his principal, but who has received the rent on account of the principal, and has paid it over to him, is any evidence that the principal is entitled to it. We have to say whether a payment, under such circumstances, was any evidence to go to the jury, and I think that it was.

ROLFE, B.—I am of the same opinion. At first I was inclined to think that the learned Judge was right in his direction, and that one link in the chain of the defendants' evidence was wanting, namely, their title to the property, by having omitted to prove a conveyance to Ward and Newman. But I am now satisfied that the proof of that conveyance was not necessary in the present case. Here the fact of the payment of the rent to the authorised agent, and the receipt of it by Ward and Newman, was *prima facie* evidence of the title of the latter. Then, as the defendants had not received any rent, it became necessary for them to shew a conveyance to themselves by persons competent to convey. They did prove a conveyance from Ward and Newman, and there was some evidence that those persons were competent to convey the estate.

PLATT, B.—In ordinary cases of this description the title of the party is shewn by the pernancy of the profits. In this case the rent is to be taken as paid to the persons really entitled to it. If the plaintiff did not know that the person to whom he had paid the money was the agent of Messrs. Ward and Newman, and that he had paid it to

him for other parties, it was open to the plaintiff to have shewn that the money was improperly paid. But the question here is, whether there is any evidence from which the jury might infer that the persons who received the profits were at that time the reversioners. I think there is; for there was a pernancy of the profits. The defendants established a *prima facie* case, and consequently there was evidence to go to the jury of their title to the premises in question. The rule, therefore, must be absolute.

1850.
HITCHINGS
v.
THOMPSON.

Rule absolute.

MILVAIN v. MATHER.

Feb. 8.

ASSUMPSIT by the plaintiff against the defendant, as one of the public officers of the Newcastle, Shields, and Sunderland Union Joint-stock Banking Company, for money lent, money had and received, interest, and on account stated.—The second plea, which was pleaded as to 350*l.*, parcel &c., set out at full length the deed of copartnership between the defendant and two others of the one part, and the plaintiff (*inter alios*) of the second part (*profert*). The deed, which was the same as that in the case of *Bosanquet v. Shortridge* (a), stated in substance, that it was entered into with the plaintiff and the other parties, only as trustees for and on behalf of the Company; that the plaintiff, at and after the time of the making the said indenture, became the holder of 70 original shares; and that the plaintiff's name was duly entered in the share register book; and that afterwards three several calls were duly

To an action against the public officer of a banking co-partnership for money lent, &c., the defendant pleaded, by way of set-off, that the plaintiff was the holder of certain shares in the copartnership under their deed; and, after setting out the deed under which the copartnership was formed, averred that a certain sum was owing for calls made in pursuance of the terms of the deed (setting out and averring performance of certain

matters required by the deed for the purpose of making such calls good). To this the plaintiff replied *nil debet*.—*Held*, on special demurrer, that the replication was bad, inasmuch as the debt arising from the calls was founded solely on the deed.—*Held*, also, that a similar replication to a like plea of set-off, which stated the plaintiff to be holder of certain shares obtained by purchase, was bad.—*Held*, also, that the pleas were good.

(a) 4 Exch. 699.

1860.
MILVAIN
v.
MATHER.

made, amounting in the whole to 5*l.* on each of the said shares. The plea set out all the proceedings necessary to make such calls good, in pursuance of the powers of the deed; namely, that four directors met together at the banking house of the Company, so as to constitute a board of directors duly convened; that they were present when a resolution was passed to the effect that a further instalment of 2*l.* should be called for upon each of the shares of the Company, and they fixed a certain day for the payment of the call, which allowed a notice of not less than one calendar month to be given of the call; that, after this resolution, a proper notice was sent to the plaintiff, which, amongst other things, stated, that if the said call was not paid on the specified day, interest at the rate of 5*l.* per cent. would become chargeable upon the amount, and that, in case it should not be paid within three calendar months, the shares would be liable to be forfeited to the Company; that the original of the notice had remained in the bank, &c. for the inspection of any shareholder who should require to peruse it; that the call so made did not exceed the amount limited by the deed, and the call amounted to 140*l.* upon the said 70 shares; that the time for the payment had elapsed before the commencement of the suit, and that the plaintiff had not paid it. The plea then, in a similar manner, set up the making of two other calls of 2*l.* and 1*l.* per share respectively, and concluded by averring that all the three calls, amounting together to 350*l.*, still remained due, and that the plaintiff was and still is indebted to the Company in that amount, upon and by virtue of the premises, and concluded by setting that sum off pursuant to the statute.—Verification.

The third plea, as to the sum of 1050*l.*, parcel &c., was of a similar character, but stated the plaintiff to be a holder of certain other shares by purchase.—Verification.

To these pleas respectively the plaintiff replied, that the plaintiff “was not nor is indebted to the said Banking Company,” modo et formâ; concluding to the country.

1850.
 MILVAIN
 v.
 MATHER.

Special demurrer, assigning for causes, that the replications were informal, by attempting to put in issue all the allegations in the pleas, and that such replications were insufficient, because the subject-matter of the set-off was founded upon a deed.—Joinder in demurrer.

One of the plaintiff's points for argument was, that the pleas of set-off were bad, inasmuch "as the subject-matter of the set-off cannot be insisted upon by the defendant, as the nominal defendant on behalf of the Banking Company, as a set-off in the present action."

The demurrer was argued in the last term (Jan. 18) by

Granger, in support of the demurrer.—The replications are bad. Nil debet could not have been pleaded, even before the New Rules, where a deed was the sole foundation of the action. That rule is to be found laid down in Chitty on Pleading, p. 511, 7th edit. Where the plea sets up matter of record alone, the plaintiff ought to take issue upon the matter of record, for by a general mode of replication he puts a matter of record to be decided by the jury: *Glynn v. Thorpe* (a). In the present case the deed is the sole foundation of this set-off. By one of the clauses in the deed, the shareholders are to pay the calls on the day appointed for such payment (b). Since, therefore, nil debet could not be pleaded to an action by the Company for the amount of a call, it cannot be replied to a plea of set-off founded upon the same claim.

(a) 1 B. & A. 153.

(b) Clause 132 requires, "That every present and future shareholder, his or her executors or administrators, shall pay every instalment that may hereafter be called for, on each of his or her shares in the capital of the Company, without fail on or before the day and at the place mentioned

for payment thereof in the circular letters or advertisements calling for the same. Provided, nevertheless, that no person shall be liable to pay a further instalment until three calendar months shall have elapsed after the day appointed for the payment of any previous instalment."

1850.
 MILVAIN
 v.
 MATHER.

The next question is, whether the pleas are good. By the 7 Geo. 4, c. 46, s. 9, banking copartnerships may sue or be sued in the name of their public officers; and although that is so, yet the claim set up by this defendant is in effect the debt of the copartnership. The 4th section of the 1 & 2 Vict. c. 96, which is made perpetual by 5 & 6 Vict. c. 85, enacts, that "no claim or demand which any member of any such copartnership may have in respect of his share of the capital or joint stock thereof, or of any dividends, interest, profits, or bonus payable or apportionable in respect of such share, shall be capable of being set off, either at law or in equity, against any demand which such copartnership may have against such member on account of any other matter or thing whatsoever; but all proceedings in respect of such other matter or thing may be carried on as if no claim or demand existed in respect of such capital or joint stock, or of any dividends, interest, profits, or bonus payable or apportionable in respect thereof." The Act prohibits a set-off by a member in the case of a claim made against him by the copartnership, but it does not prohibit a set-off in the case where the proceedings are against the copartnership by a member, as in the present case. The natural inference is, that a mutual debt due by a member to the copartnership, although the latter be sued in the name of their public officer, may be set off. The pleas, therefore, are good.

Hugh Hill, contra.—If this claim of the Company against the plaintiff can be set off, the replications are good. It is admitted that, prior to the New Rules, where the action was founded merely upon a deed, nil debet was not a good plea. The rule is well laid down in the notes to *Jones v. Pope* (a):—"Where the specialty or record is but inducement to the action, and matter of fact is the foundation

(a) 1 Wms. Saund. 38 a.

of it, nil debet is a good plea: as in debt for rent by indenture, or for an escape, or on a devastavit, the indenture or judgment is but inducement, and the arrears of rent, the escape, and devastavit are the foundations of the action. But, on the other hand, where the action is grounded upon a record or specialty, nil debet is no plea (a): though facts are mixed with it, as in case by the assignee of the sheriff upon a bail bond, nil debet is no plea (b). Now here the deed is mere inducement to the claim. The debt is founded upon other matters in pais, which arose subsequently to the deed. If this be not the proper form of replication, it is difficult to see what form would be appropriate. [Parke, B.—The defendants contend that the form of replication ought to be such as would have been adopted by way of plea, if an action were brought for the amount of the calls; and that, in such case, the proper plea would be a plea of non est factum.] Here the right of action for the calls does not depend solely upon the deed: certain acts must be done. This is similar to the case of the occupation of land under a deed. It is clear that the pleader who drew these pleas was of opinion that the claim did not rest wholly upon the deed, inasmuch as the pleas state the plaintiff to be indebted “by means of the premises.” There is no covenant with the Company, but with certain trustees. The New Rules do not prohibit this form of replication; but on the contrary, if the defendants were to plead a set-off for a debt due upon certain bills of exchange, nil debet would still be a good and the proper form of replication to that plea. The third plea is wholly rested upon a liability arising from the purchase of shares. This is clearly a claim which

1850.
MILVAIN
v.
MATHER.

(a) Hard. 332; 3 Lev. 170; *Tyndal v. Hutchinson*, Gilb. C. B. 61, 3rd edit.; 2 Ld. Raym. 1500; *Warren v. Consett*, 2 Str. 778; 8 Mod. 107.

(b) 2 Ld. Raym. 1503; 2 Str. 780; 5 Burr. 2586; *Hart v. Weston*; see Willes's Rep. 127; *Morse v. James*.

1850.
MILVAIN
v.
MATHER.

does not arise solely on the deed. [He also cited *Warner v. Theobald* (a), and *Blakesley v. Smallwood* (b).]

Granger replied.

Cur. adv. vult.

PARKER, B., now said:—In this case we took time for consideration, and are of opinion that the replication of “not indebted” is bad. The plea is founded *wholly* upon the deed. Where the defence arises partly upon a deed, and partly upon some other matter, as in the case of a lease by indenture, where the whole matter arises in part on the deed and in part from the occupation, or in the case of debt for an escape, where the judgment is merely introductory and by way of inducement, there is a difference; but here the obligation to pay the call rests entirely on the deed, which contains a covenant to pay the call upon certain things being done. But, if these things are done, still the obligation to pay the call rests wholly on the deed. Now, the replication of “not indebted” to a plea of set-off is not good, inasmuch as there is no decision to the effect that such a replication to a plea of set-off (which is in the nature of a cross-action) is allowable, where it could not have been pleaded as a plea in the action itself. As the point is one of some novelty, the plaintiff may amend, otherwise there will be.

Judgment for the defendant.

(a) Cowp. 588.

(b) 8 Q. B. 538.

1850.

CHAPMAN and Another v. MILVAIN.

Feb. 25.

THIS was a special demurrer to a plea, and was argued in Hilary Term last, (January 18,) immediately after the preceding case of *Milvain v. Mather*.

Granger, for the plaintiffs, cited *Pentland v. Gibson* (a), *Rex v. James* (b), *Reg. v. Beard* (c), and *Skinner v. Lambert* (d).

Hugh Hill, contra, cited *Smith v. Goldsworthy* (e), *Wills v. Sutherland* (f), and *Steward v. Greaves* (g).

The pleadings and the arguments are so fully set forth in the judgment of the Court, that it is not necessary to repeat them.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This is an action by the two plaintiffs, Messrs. Chapman, on a covenant with them by name, contained in the deed of copartnership of the Newcastle, Shields, and Sunderland Union Joint-stock Banking Company, made on the 1st of October, 1830. The different subscribers covenant, each one for himself, to pay calls duly made, and the defendant, being a subscriber, is sued on his covenant, for non-payment.

The defendant craves oyer of the deed, which is set out; and then pleads, that the Banking Company was and still is a company of persons united in copartnership for

A Company of persons, established for the purpose of carrying on the business of bankers under the provisions of the 7 Geo. 4, c. 46, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the copartnership, are bound to sue in the name of one of their public officers, and are not at liberty to sue in the names of the covenantees named in the deed of copartnership. The words of the 9th section of the Act, "shall and may," are obligatory, and not merely permissive.

(a) 1 Alcock & Napier, 310.

(b) 7 C. & P. 553.

(c) 8 C. & P. 143.

(d) 4 Man. & G. 477.

(e) 4 Q. B. 430.

(f) 4 Exch. 211.

(g) 10 M. & W. 711.

1850.
CHAPMAN
v.
MILVAIN.

the purpose of carrying on the trade and business of bankers in England, according to the statute 7 Geo. 4, c. 46; that there were and are public officers of the copartnership according to that statute, and that the sums of money sought to be recovered in the action were debts, claims, and demands due to the copartnership, and relating to the concerns of the same.

To this plea there is a special demurrer; and the question is, whether the statute 7 Geo. 4, c. 46, s. 9, as to the right of a joint-stock Company to sue, applies to such a Company as this; and, if it does, whether that part of the section is permissive or obligatory.

The section is to this effect:—That all actions and suits against any person who may be at any time indebted to any such copartnership, carrying on business under the provisions of the Act, and all proceedings at law or in equity to be commenced or instituted *for or on behalf* of any such copartnership against any person or persons, bodies politic or corporate, or others, whether members of such copartnership or otherwise, for recovering any debts, or enforcing any claims or demands due to such copartnership, or for any *other matter relating to the concerns of such copartnership, shall and lawfully may*, from and after the passing of the Act, be commenced or instituted and prosecuted in the name of any one of the public officers, nominated as aforesaid for the time being of such copartnership, as the nominal plaintiff for and on behalf of such copartnership; and that all actions or suits and proceedings at law or in equity, to be commenced or instituted by any person or persons, bodies politic or corporate or others, whether members of such copartnership or otherwise, against such copartnership, *shall and lawfully may* be commenced, instituted, or prosecuted against every one or more of the public officers nominated as aforesaid for the time being of such copartnership, as the nominal defendant for or on behalf of such copartnership; and that all indictments, in-

formations, and prosecutions by or on behalf of such copartnership for any stealing or embezzlement of any money, goods, effects, bills, notes, securities, or other property, of or belonging to such copartnership, or for any fraud, forgery, crime, or offence committed against or with intent to injure or defraud such copartnership, *shall and lawfully may* be had, preferred, and carried on in the name of one of the public officers, nominated as aforesaid for the time being of such copartnership; and that, in all indictments or informations to be had or preferred by or on behalf of such copartnership, against any person or persons whomsoever, notwithstanding such person or persons may happen to be a member or members of such copartnership, it *shall be lawful and sufficient* to state the money, goods, effects, bills, notes, securities, or other property of such copartnership, to be the money, goods, effects, bills, notes, securities, or other property of any one of the public officers nominated as aforesaid for the time being of such copartnership; and that any forgery, fraud, crime, or other offence committed against, or with intent to injure or defraud any such copartnership, *shall and lawfully may*, in such indictment or indictments, be laid or stated to have been committed against or with intent to injure or defraud any one of the public officers nominated as aforesaid for the time being of such copartnership; and any offender or offenders may thereupon be lawfully convicted for any such forgery, fraud, crime, or offence; and that, in all other allegations, indictments, informations, or other proceedings of any kind whatsoever, in which it otherwise might or would have been necessary to state the names of the persons composing such copartnership, *it shall and may be lawful and sufficient* to state the name of any one of the public officers nominated as aforesaid for the time being of such copartnership; and the death, resignation, or removal, or any act of such public officer, shall not abate or prejudice any such action, suit, indictment, prosecution,

1850.
 CHAPMAN
 v.
 MILVAIN.

1850.
CHAPMAN
v.
MILVAIN.

information, or other proceedings commenced against or by or on behalf of such copartnership; but the same may be continued, prosecuted, and carried on in the name of any other of the public officers of such copartnership for the time being.

That the Company *may* sue on a covenant such as this was hardly disputed; indeed, it was not disputed on the argument before us. That question must be considered as settled by the case of *Wills v. Sutherland*, and the prior cases there referred to. The only question argued was, whether they *must* sue. The case of *Steward v. Greaves* decided, that the part of the section which relates to actions against the Company was obligatory on all who had causes of action against them. The words "shall and lawfully may," are in their ordinary import obligatory, and ought, as was said in that case, according to the established rules, to have that construction, unless it would lead to some absurd or inconvenient consequence, or be at variance with the intent of the legislature, to be collected from other parts of the Act. The ordinary construction was in that case manifestly in accordance with the intention of the framers of the Act. It would have entirely altered the nature of the obligation of the partners of a joint-stock Bank, to hold that they could be sued as individuals.

There is not the same forcible reason for construing these words in their ordinary sense, where the Company are plaintiffs; but there is no reason why we should not. Indeed, it would be inconvenient to the covenantors to have their position altered according to the option of the Company. If the Company chose to sue the covenantors in the name of the covenantee, the covenantee only would be liable to pay costs in the case of a nonsuit or verdict against him, and the defendant would have a set-off only of debts due from the covenantee; or if the Company chose to sue in the name of the officer, the Company would

be liable to costs, and the defendant have a set-off of the Company's debt only. This inconvenience affords an additional ground for holding that the words are to bear their ordinary sense, and be held to be obligatory.

1850.
 {
 CHAPMAN
 v.
 MILVAIR.

It will be said, then, that the Company, if this construction is to prevail, could not take a security to a trustee, who alone could have the legal title to sue—a right which every individual person has—and that it could not have been the intention of the legislature to deprive Companies of that privilege. We are not prepared to say that the Company might not so word the security to their trustee as to avoid that inconvenience, if it be one, and vest the sole right of action in the trustee; but on a covenant worded as this is, we do not think that object, if it existed, was accomplished. We see no reason, therefore, for construing these words, which are *prima facie* obligatory, in any other than their usual sense. If, indeed, this question had been concluded by judicial decision, we should be bound by it; but the cases cited do not appear to be sufficient for that purpose. *Rex v. James*(a) reports the inclination only of the opinion of my Brother *Patteson*, that the statute 7 Geo. 4 might not be imperative as to laying the intent to defraud the public officer; and in the subsequent case of *Rex v. Beard*(b), where Mr. Justice *Coleridge* intimated a similar opinion, the point was just mentioned, not argued. We are aware of the decision of the Court of Queen's Bench in Ireland, *Pentland v. Green*(c), in which that Court held that the private statute, 5 Geo. 4, c. clx, was only permissive, and that the Company to which it applied had the option of suing in the name of the covenantee. But the language of that statute, as appears by the report, was different from the present statute, the 7 Geo. 4, c. 46, and seems to have been,

(a) 7 C. & P. 553.

(b) 8 C. & P. 145.

(c) Alc. & N. 310.

1850.
 CHAPMAN
 v.
 MILVAIN.

according to its ordinary construction, permissive only. Upon the whole, we think the words "shall and lawfully may" are obligatory, and ought so to be construed in this case; and therefore our judgment should be for the defendant.

Judgment for the defendant.

Feb. 7.

GLOVER v. THE LONDON AND NORTH WESTERN RAILWAY COMPANY.

B., having contracted with a Railway Company to set up the fencing of their line, employed G. to supply posts and rails for a part of the line. B. became bankrupt, and a quantity of the unfixed fencing was removed by G.'s direction to an adjacent field, and sold to the plaintiff. This fencing was afterwards carried back to the railway by labourers acting under the direction of an overlooker of the Company. G. asked the men upon what authority they removed the fencing, and was told to apply to the engineer of the Company.

TROVER for certain posts and rails.—Plea, not guilty.

At the trial, before *Coleridge, J.*, at the Leicester Summer Assizes, 1849, it appeared that, the defendants being empowered to construct a branch line of railway, called "The Stamford and Rugby Railway," one Burton contracted with them to set up and complete the fencing of the line, and that one Gimpson contracted with Burton to supply the posts and rails for fencing a portion of the line. Some of these posts and rails were set up; but Burton having become bankrupt, disputes arose between him and the Company, and a quantity of the unfixed fencing was removed by Gimpson's direction to an adjacent place, called Foxes Field, and sold by him to the plaintiff. This unfixed fencing was afterwards carried away from Foxes Field to the railway, by labourers acting under the direction of one Grover, an overlooker of the Company. A person in the employ of Gimpson asked the men upon what authority they removed the fencing, and was told to apply to Wilson, the engineer of the Company, who, on being plied to, "dared him to remove the fencing," and said "he would enter an action if he did." Gimpson afterwards saw

G. afterwards saw one of the directors of the Company, who told him to attend a meeting of the Company. G. went to the office of the Company for that purpose, and was told by the same director, that there was a prospect of an amicable arrangement with B., and that all claims on the line would be paid. A demand was afterwards made upon the secretary of the Company, who stated that he was not the party on whom the demand ought to be made:—*Held*, in trover against the Company, that there was no evidence of a conversion by them.

one Ellis, a director and chairman of the committee of works, who recommended him to attend a meeting of the Company in London. Gimpson went to the offices of the Company for that purpose, and there saw Ellis, who then told him that there was a prospect of an amicable arrangement with Burton, and that all claims on the line would be paid. A demand of the posts and rails was afterwards made upon one Watkins, the secretary of the Company, who stated that he was not the party on whom the demand ought to be made. Under these circumstances it was objected, on behalf of the defendants, that there was no evidence of a conversion by them. The learned Judge declined to nonsuit, and a verdict was found for the plaintiff, leave being reserved for the defendants to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

1880.
GLOVER
v.
LONDON
AND NORTH
WESTERN
RAILWAY Co.

Mellor shewed cause.—First, there was evidence of a conversion by the removal of the posts and rails from Foxes Field to the railway. The act was done by persons employed in the construction of the railway, who must therefore be presumed to be the servants of the Company, and who were acting within the scope of their authority, and for the benefit of the Company. The case, therefore, falls within the principle of the decisions in *Smith v. The Birmingham Gas Company* (a), and *Maud v. The Monmouthshire Canal Company* (b). The statement of Ellis, one of the directors, is evidence against the Company of their liability, in the same way that the admissions of a parishioner will affect the parish, though he cannot bind them by his contract. [*Parke, B.*—Admissions made by the directors at a board meeting will bind the Company, but not what a single director says when not at a board meeting.] This case is not within the difficulty which arose in *Quarman v. Burnett* (c), and *Laugher v. Pointer* (d), for the

(a) 1 A. & E. 526.

(b) 4 M. & G. 452.

(c) 6 M. & W. 499.

(d) 5 B. & C. 547.

1850.
 GLOVER
 v.
 LONDON
 AND NORTH
 WESTERN
 RAILWAY CO.

engineer and overlooker were clearly the servants of the Company. It also differs from *Rapson v. Cubitt* (a), for there the injury was caused by the negligence of a sub-contractor. [Parke, B.—Assuming that the wrongful act was done by the servants of the Company, there is no evidence that the Company ordered or assented to the act of their workmen.] Secondly, the demand on the secretary, and his conduct, was evidence from which the jury might find a conversion. By the 135th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, “Any summons or notice, or any writ or other proceeding at law or in equity requiring to be served upon the Company,” &c., may be served by “being given personally to the secretary.” This demand is in the nature of a notice to the Company. [Parke, B.—It is not a notice within the meaning of that section.]

Whitehurst (Macaulay with him), in support of the rule.—Burton was the contractor for fencing the line, and it is to be presumed that the acts were authorised by him, rather than by the Company. The plaintiff has failed to shew either that the defendants authorised any one to commit the tort, or that they adopted it.—(He was then stopped by the Court).

PARKE, B.—I think there was no evidence to fix the Company. In the first place, it is clear that the Company did not do the act complained of by their servants, but through the medium of Burton the contractor, and the inference therefore is, that the act was that of the contractor, and not of the Company. If then the act was not that of the Company, they cannot be liable unless they have adopted it. In order to fix the Company, it must be shewn that the act was done by their authority, that is, by some person acting for them, within the scope of his authority,

(a) 9 M. & W. 710.

or by appointment under seal, or by the Company acting together in committee. That is not the case here, and there is no evidence of a subsequent adoption of the act of the contractor.

1850.
GLOVER
v.
LONDON
AND NORTH
WESTERN
RAILWAY Co.

ALDERSON, B.—I do not see any evidence of a conversion by the Company. The act was originally done by the contractor, and if the Company had adopted it, that would have been evidence of a conversion by them. But that is not the case here.

ROLFE, B., concurred.

Rule absolute.

CARE v. MOSTYN.

Feb. 11.

ASSUMPSIT for money had and received, and on an account stated.—Plea, non assumpsit.

At the trial, before *Wightman*, J., at the Summer Assizes at Liverpool, 1847, a verdict was found for the plaintiff for 6*l.* 1*s.* 6*d.*, subject to the opinion of this Court, on a case which in substance embodied the following facts:—

The action is brought to recover the amount of certain surplice fees received by the defendant. The plaintiff is

Under the 1 & 2 Will. 4, c. 38, s. 14, by which the fees, dues, offerings, or emoluments of right or custom belonging to the incumbent of the pariah, chapelry, or place in which the newly erected church is situate, are to be received

on account of such incumbent, except such part as the commissioners, with the consent of the bishop, the patron, and the incumbent in some cases, and the bishop alone, with the consent of the patron and incumbent, in others, shall assign to the minister of the district church,—the term “chapelry” means a legal parochial chapelry, and therefore one which is immemorial.

Upon a trial, where the question was, whether the chapelry of St. H. was a legal parochial chapelry—*Held*, that the statement of a witness, that he had heard from a former incumbent of St. H. that the people of four townships and another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible.

So, a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was held admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate, is admissible.

Held, also, that the answer of the incumbent of St. H., and other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter.

1850.

CARR

v.

MOSTYN.

the incumbent of the Chapel of St. Helen's, in the county of Lancaster. The defendant is the incumbent of the Chapel of St. Thomas, in the same county.

The Chapel of St. Helen's, as well as that of St. Thomas, is situate within the parish of Prescott, which comprises fifteen townships, the whole of which contribute to the repairs and maintenance of the parish church, which is situate in the parish and township of Prescott. The living is a vicarage in the gift of King's College, Cambridge. The Chapel of St. Helen's, now called St. Mary's St. Helen's, but which was formerly known as St. Ellen's, or St. Helen's, is an old building long used as a chapel for the performance of divine worship, in the township of Windle, in the parish of Prescott. The feoffees, acting under a deed of trust hereinafter mentioned, have the nomination of the minister or incumbent. The Chapel of St. Thomas was erected by Peter Greenall, Esq., under the provisions of the Acts 1 & 2 Will. 4, c. 38, and 1 & 2 Vict. c. 107, and was consecrated on the 8th of October, 1839.

The plaintiff at the trial called two previous incumbents of St. Helen's, and one of the trustees and patrons of the chapel, who stated in effect, that St. Helen's is within the parish of Prescott, but three or four miles from the parish church of Prescott; that St. Helen's church was an old one when the first incumbent went there, and that there was a house for the incumbent, and glebe; that he was nominated by the trustees, and that the vicar had nothing to do with it; that full service, morning and evening, was performed there; that there was a font, and baptism, marriages, burials, churchings of women, and confirmations, were performed there, and all the services of a parish church. That the people came to that church for baptism, &c., from the townships of Sutton, Eccleston, Parr Windle, and part of Haydock; (but one of the witnesses stated, that they came from parts of Sutton and Eccleston respectively, instead of from the whole of those

1850.

CARR

v.

MOSTYN.

townships). All the townships, except Haydock, were in Prescott parish. Haydock was in the parish of Winwick. Marriages and burials of persons from other parts of the parish of Prescott were sometimes performed at St. Helen's. That the vicar of Prescott never interfered with the performance of the rites of the church within what the witnesses called the parochial chapelry; and that the successive incumbents of the chapelry visited the sick within the same; that one of them, a Mr. Finch, at first refused to do so, but was compelled to perform that duty by the trustees. That they received all the surplice fees for burials, marriages, and churchings, and the whole emoluments for divine service within that district as incumbents, and never accounted to any one for them. That the population varied from 18,000 to 20,000. That there were parish registers. That the inhabitants of the district assigned to St. Thomas used to attend St. Helen's chapel, and the district assigned to St. Thomas was within that belonging to St. Helen's, being in the township of Eccleston. That, for some time after the consecration of St. Thomas, the incumbents of that chapel paid surplice fees received by them to the incumbent of St. Helen's. That the incumbent's house at St. Helen's was under trustees, successors of the original feoffees, who had lately parted with it and had provided another residence; and the trustees had also dealt in the same manner with the glebe. That the income of the incumbent of St. Helen's arises from surplice fees, and from tithes of hay, and from an estate, which, together with that from whence the tithes issued, were not in the so called chapelry, or in the parish of Prescott at all. That there was no chapel rate levied there. That the chapel had chapel-wardens,—one appointed by the incumbent, and the other by the trustees,—but that it had not any wardens previous to the consecration in 1816. That the trustees repaired the church at the expense of private individuals. That the pews in St. Helen's were held by persons resid-

1850.
 Carr
 v.
 Mostyn.

ing in the district, with one exception, or having property there.

Mr. Fildes, one of the trustees of St. Helen's, aged 67 years, and who had always attended St. Helen's chapel, stated that the district of St. Helen's had been well known all his time. It also appeared by the evidence of one of the incumbents of St. Helen's, that the sacramental bread and wine for the Chapel of St. Helen's were furnished out of the general church rate of the parish of Prescott, and that all the townships contributed to the general church-rate of the parish of Prescott. It was also stated by one of the previous incumbents, that one ground for saying that the people of the four townships and Haydock came to St. Helen's was, that his predecessor, Mr. Pigott, who was dead, told him so; but, that answer being objected to by the defendant, was only to be evidence if the Court thought it admissible.

The receipt of fees by the defendant was proved.

The deeds of consecration and assignment of district to St. Thomas, dated the 8th of October, 1839, were proved. These deeds made no mention of any chapel or chapelry of St. Helen's, and treated the chapel and district assigned to St. Thomas as being situate in the parish of Prescott, independent of any supposed chapelry of St. Helen's. In the schedule to the consecration deed were the following clauses:—

“Baptisms, marriages when, and as the same shall be authorised by law, churchings, or burials, shall be solemnised and performed in this church, subject to all Acts of Parliament, laws and customs, relating to the performance of such offices. But, in order that the erection of this church may not prejudice the incumbent of the parish church of Prescott, nor lessen the revenues thereof, there shall be paid to the minister, and also to the clerk and sexton of this church for the time being, for the performance of the several and respective duties which may at any

time hereafter be performed therein, double the fees which are usually or of right ought to be paid for the performance of any such duties in the said parish church; and the said minister, clerk, and sexton of this church for the time being, shall collect and receive such double fees, and account for and pay one moiety or equal half part thereof to the minister, clerk, and sexton of the said parish church respectively, by two equal half-yearly payments in each year, to wit, on the 1st of January and the 1st of July, and that the remaining moiety or half part thereof shall be divided amongst the minister, clerk, and sexton of this church for the time being, in such shares and proportions as fees of the like nature and for the like services are usually or of right ought to be paid and divided among the minister, clerk, and sexton of the said parish church."

1850.
CARR
v.
MOSTYN.

The schedule also contained a clause, that the incumbent and churchwardens should keep a register of all christenings and burials, and transmit the same to the vicar or other proper officer of the parish of Prescot.

The incumbent of St. Helen's in 1839 stated, that he protested against the first of these clauses, and, in consequence thereof, the incumbents of St. Thomas paid surplice fees to him, and not to the vicar of Prescot, for some years.

A faculty, dated the 3rd of May, 1816, for pulling down part of St. Helen's Chapel, previous to the enlargement, and a consecration deed of additional burial ground adjoining the chapel, dated the 3rd of July, 1816, and a consecration deed of St. Helen's Chapel, dated 2nd of October, 1816, were also given in evidence. In each of these documents the chapel was referred to as a parochial chapel, and the district was styled a chapelry, and the inhabitants referred to as residing in the chapelry; but no reference was made to any previous act of consecration, nor was any defined district mentioned as appertaining to the

1850.
CARE
v.
MOSTYN.

chapel. Provisions were contained in the consecration deed of the chapel for the appointment of chapel-wardens, and raising funds for the expenses of the chapel by means of rates on the pews, but no reference was made to any other description of chapel rate. Registers of incumbents of St. Helen's were produced from the diocesan registry. The first was dated October 5, 1758, and nominated a clerk "to read and perform divine service according to the usage of the Church of England as by law established, in the chapel of Hardshaw within Windle, in the city of Lancaster, called St. Ellen's Chapel, now vacant by the death of P. B., Clerk, &c." The next, dated December 26, 1785, was in similar terms, with the addition of a request from the trustees to the Bishop "to grant the clerk licence to serve the said cure, and to perform all divine offices therein accordingly." The third, dated September 21, 1815, was in terms similar in effect. The next, dated December 12, 1836, stated that the parties named therein, "being the major part of the trustees, and patron of the chapel formerly called St. Helen's Chapel, but since consecrated by the name of St. Mary's in Hardshaw within Windle, otherwise St. Helen's, within the parish of Prescott, in the county of Lancaster and diocese of Chester," in exercise of the power and authority contained in indentures of lease and release, dated respectively October 21 and 22, 1825, for the appointing new trustees of the chapel, and of all other powers, &c., did nominate a clerk to be curate, minister, or chaplain of the said church or chapel of St. Mary within Hardshaw in Windle, otherwise St. Helen's aforesaid; and another nomination, dated October 11, 1841, nominated unto the bishop, and to the perpetual curacy of St. Mary's Church, St. Helen's, a clerk, praying the bishop would be graciously pleased to grant him his licence for serving the said cure, and invest him with all and singular the rights,

1850.
 CASE
 v.
 MOSTYN.

members, and appurtenances thereunto belonging. The last, dated the 24th of September, 1846, being the nomination of the plaintiff, was in similar terms.

The defendant gave in evidence the deed of feoffment (which was in Latin) of the chapel, dated the 23rd of January, 11 James I, of Katherine Dowmbell and James Dowmbell her son, giving, granting, and confirming to certain trustees, "all those the messuage, chapel, and building in Hardshaighe within Windle, called the Chapel of St. Helen's, with all and singular their appurtenances; and also all that piece of land lying around the chapel, called the Chapel Yard, and upon which the messuage, chapel, or buildings aforesaid stand, or have been built, together with a certain incrothiamento or small piece of land within a certain inclosure in the same place, called the Chapel Croft, containing" &c.; habendum to them and their heirs and assigns for ever, subject to the trusts in the schedule mentioned, to hold from the capital lords of the fee for the services thence owing and of right accustomed; and also to pay annually to the said Katherine and James Dowmbell, their heirs and assigns, one penny. There was the appointment of attornies for livery of seisin, and an indorsement, that seisin was accordingly delivered.

The schedule (which was in English) was as follows:—

"Know all men by these presents, that we, Katherine Dowmbell and James Dowmbell, named in the said deed of feoffment whereunto this schedule is annexed, as well to the intent that divine service may be continued in the chapell mentioned in the said deed, and to the intent that the same, now being in great decaie, might be repaired for the ease of our loving neighbours of Hardshaighe, Windle, Parre, Sutton, Haidocke, and Eccleston, and of their posterity, as also for divers other good causes and considerations us moving, have made the said deed to the uses and intents hereafter in this schedule expressed and declared. Wherefore, we the said Katherine and James Dowmbell

1850.

CARR
v.
MOSTYN.

do now by these presents openly publish, set forth, and declare, that the very true intent and meaning of the making of the said deed of feoffment and the execution thereupon to be had and made, is and shall be, that the trustees (naming them) in the said deed of feoffment, and the survivors or survivor of them, and his heirs, shall, presently after the execution of the same deed, stand and be seised of and in the messuage, chappell and buildings mentioned in the said deed, with appurtenances, &c., to the only use and behoofe of the said trustees, and of their heirs and assigns for ever, upon trust, that the said co-feoffees named in the said deed of feoffment, their heirs and assigns, and the survivor of them or some of them, shall from time to time, and at all times hereafter, repaire and upholde the said messuage, chappell and premises, and shall also, so often as the same shall become void or be without any incumbent or fit person to read divine service faithfully and truly, elect and choose lawful and fit persons to read divine service at the said chappell for ever; and set down and determine orders, directions, and rules for the government and ordering of the said chappell, chaplen, and incumbent from time to time, and shall and may appoint seats and forms in the said chappell unto the inhabitants of the said townships, as to the said feoffees, their heirs and assigns, or the greater number of them, shall be thought meet and convenient; respecting always, that persons may be preferred in their seats according as they shall extend their bounties and furtherance in maintenance of the said chappell and incumbent there: Provided always, and it is the mind and full intent of us the said Katherine and James Downbell, and of the making thereof, that when any of our said feoffees shall die or depart out of the towns aforenamed to dwell elsewhere, or to be disabled in person for any cause, that then and in such case or cases, within one month after such death, departure, or disability, it shall be lawful for the residue of the said feoffees then living (not

1850.
 CARR
 v.
 MOSTYN.

disabled), to elect other person or persons of anie the townes aforesaid to supply the rooms of such defect, for the government, order, direction, and seating of the said chappell and chaplen; also, that the survivors of our said feoffees, and the two last and longest living of them, shall make feoffment or feoffments of the premises unto such other person or persons so elected or to be elected, within the townes aforesaid, or within some of them, to the number of nine at the least, to be governors and feoffees aforesaid, and to their heirs and assigns for ever, to the use and intent aforesaid; and that such elections of persons and making of feoffments, when and as often as occasion shall require, be used and continued for ever according to the mind of us expressed in these presents, and not otherwise."

The Chapel of St. Helen's had been augmented by the Governors of Queen Anne's bounty, the first time in 1716, the second time in 1725, and the third in 1825. On the occasion of the last of these augmentations, certain queries were addressed by the Bishop of Chester to the then perpetual curate of St. Helen's, the vicar of Prescott, and another clergyman. Copies of these queries, and of the whole of the answers thereto, were to form part of the case, if this Court should be of opinion that they were properly receivable in evidence as against the present defendant. Amongst the queries were the following:—"Is it united to or consolidated with any other, and what church? Is it a parish of itself? If a chapel of ease, is the incumbent of the mother church obliged to do the duty himself or provide a curate to do it for him? And what distance is the chapel from the mother church? What is the number of inhabitants within the parish or chapelry?" Answer:—"It is a parochial chapelry within the parish of Prescott. It is not united to or consolidated with any other church. The number of inhabitants within the district under the immediate care of the minister of St. Helen's is at least 9000. Prescott is four miles from St. Helen's." In another answer

1850.
CARR
v.
MOSTYN.

it was stated, that the full services of the church were performed at St. Helen's, and that half of the incumbent's time was taken up in visiting the sick; that the surplice fees were very little more than 20*l.* per annum, as very few marriages were solemnised at St. Helen's. These answers were signed by the vicar of Prescott and the perpetual curate of St. Helen's, and a clergyman of an adjoining parish.

The defendant also gave in evidence a case submitted for the opinion of a proctor, in 1809, by Mr. Finch, the then incumbent of St. Helen's, with the opinion of a proctor thereon, which said case and opinion were on the 26th of September, 1815, sent to the then vicar of Prescott, in and with a letter by a then acting trustee of St. Helen's. These documents were objected to by the counsel for the plaintiff, and were respectively to be used or not, as the Court should think them admissible or not. The case in effect stated the preceding deed of feoffment of 11 James I, the augmentations by Queen Anne's Bounty, and purchase of lands therewith, and the chapel was stated to have gone by the name of a donative. That it knew no acknowledgment to Prescott Church, though that parish extended close to the chapel-yard walls; that the inhabitants of the said townships of Windle, Sutton, Parr, Eccleston, and Haydock, who could purchase or rent seats in St. Helen's Chapel, resorted to it to worship, might be married in it, (though many of them went to other churches for those purposes,) might have their children christened in it, and bury their dead in the churchyard if they had any breadth of ground in it, or else they went to other churchyards for that purpose. It was also stated, that endowment lands of St. Helen's paid tithes to the rector and vicar of the parish, and the inhabitants, including the minister of St. Helen's, were liable to the church rates of the parish. The opinion was, that the chapel, originally a donative, became a perpetual curacy on augmentation of Queen

1850.
 CARR
 v.
 MOSTYN.

Anne's Bounty, under the 1 Geo. 1, c. 10, s. 62, but its character was not otherwise affected thereby; that its duties were local and confined within the walls of the chapel; and that the duty of visiting the sick continued in the ministers of Prescott and Winwick.

The register books of the parish church of Prescott, relating to baptisms, marriages, and burials within the parish of Prescott, were put in evidence. The books commenced, as to baptisms, in the year 1580; as to marriages, in the year 1573; and as to burials, in the year 1573; and, with some occasional exceptions, continued regularly down to the present period. Up to the year 1677 the books shewed the performance of ceremonies for parties from every part of the parish, and during that period the larger number of marriages recorded were of parties residing in that part of the parish which is comprised in the district now claimed as attached to St. Helen's. From the commencement of those registers to the present time great numbers of persons have been baptized, married, and buried at the parish church from the district now claimed as belonging to St. Helen's. During the last seventy years, however, with respect to baptisms and burials from the two townships of Windle and Parr, the number of those ceremonies at the parish church has been inconsiderable as compared with the number of those from the same two townships at St. Helen's Church.

Various extracts from the register books of the parish were annexed to the case; and from them it appeared, that, in 1677, and nine following years, and occasionally for some subsequent years, returns were forwarded from St. Helen's to the parish church of all baptisms had at St. Helen's, and such returns were entered in the parish books with a heading thus: "Christenings by Mr. Greg, Preacher at St. Helen's Chapel, *Nonconformist*." And other similar entries were made in the parish register of returns from other nonconformist ministers officiating within the parish

1860.
CARE
"
MOSTY.

of Prescott, at other chapels within the parish. There were also several similar returns of burials made at St. Helen's, by preachers stated to be nonconformists; and in the parish register book of burials for the year 1678, appeared an entry of persons buried "in other burial places belonging to the parish of Prescott, and not then put in, wrapped, or wound up in any shift, shirt, sheet, or shroud made or mingled with flax, hemp, silk, hair, gold or silver, or other than what is made of sheep's woole only, or in any coffin lined or faced with any cloth, stuff, or any other thing made or mingled with flax," &c., according to the 30 Car. 2, stat. 1, c. 3; and burials there appeared as made at St. Helen's by a nonconformist preacher. The register books of the chapel of St. Helen's were also put in evidence. The entries of baptisms began on the 18th of October, 1713, of burials on the 8th of April, 1721, and marriages in May, 1722; and it appeared from the register of St. Helen's, that, from the year 1813 up to the present time, the registers had been kept in accordance with the Act 52 Geo. 3, c. 146, except so far as altered by the more recent Marriage Act. During the whole of this time the baptisms and burials there solemnised appeared to have been almost exclusively from the four townships of Windle, Parr, Sutton, and Eccleston, and the township of Haydock; and during the last seventy years, the number of baptisms and burials solemnised at the chapel of St. Helen's from the four townships in the parish of Prescott, claimed by St. Helen's, were in a very much greater proportion as compared with the number from the same townships solemnised at the parish church of Prescott; but from the township of Eccleston the parish church had always had the larger number. With respect to the marriage register at St. Helen's from 1720 to 1833, no mention was made, save in a few cases, of the townships whence the respective parties came; but from the latter time to December, 1846, by far the greater number (considerably more than two-thirds of the whole) of parties re-

siding in the district now claimed by St. Helen's have been married at the parish church.

The question for the opinion of the Court was, whether, under the preceding state of facts, the plaintiff was entitled to recover. If the opinion of the Court should be in the affirmative, the verdict was to stand; but if in the negative, a nonsuit was to be entered. The Court were to be at liberty to draw any inference from the facts or evidence, and to act as they should think a jury ought to have done.

The case was argued in Hilary Term last, (Jan. 16, 21, and 25,) by

1850.
CARR
v.
MOSTYN.

Cowling, for the plaintiff.—The plaintiff, as incumbent of St. Helen's, is entitled to the fees which he seeks to recover in this action. By the 14th section of 1 & 2 Will. 4, c. 38, it is provided, that "all fees, dues, offerings, and other emoluments, which of right or custom belong to the incumbent or clerk of any parish, chapelry, or other place in which such church or chapel shall have been or shall be erected, shall be received by, or for and on account of such incumbent and clerk respectively, and be paid over to them," &c. And then the clause contains an exception, which has no application to the present question. It is clear that the apportionment of the fees by the bishop in 1839, as contained in the deed of consecration, cannot affect the decision of the Court, inasmuch as that appropriation is void. It was, no doubt, the intention of the bishop that the deed should be so drawn as to give the fees to the proper person, and that this matter was inserted by mistake. The district of St. Helen's is a chapelry within the meaning of the preceding section. It is not necessary to contend that this chapelry must be a legal parochial chapelry in the strictest meaning of those terms, for the language of the 14th section is very general. It appears by the facts of the case, that the district of St. Helen's has been treated for upwards of a century as

1850.
 Carr
 v.
 Martin.

altogether a distinct and separate district. But, assuming it to be necessary for the plaintiff to shew that this district of St. Helen's is a strictly legal parochial chapelry, it is submitted that the admitted facts lead to that conclusion. The queries addressed to the curate of St. Helen's, and the answers thereto, are admissible, as touching a matter of a public nature. By the stat. 2 & 3 Anne, c. 11, first fruits and tenths, to be appropriated to the augmentation of small livings, were settled upon a corporation established by that Act; and, in pursuance of the Act, the Queen by letters patent appointed certain governors; and by the 1 Geo. 1, st. 2, c. 10, the courts and committees of the said governors had power given them to administer an oath to such persons as should give them information or be examined concerning anything relating to the execution of their trust. These queries and answers are evidence as taken in pursuance of the Act. The district of St. Helen's is a parochial chapelry, as falling within the rule given in the 2nd Inst. 363, where it is said, "When the question was, whether it were ecclesia aut capella pertinens ad matricem ecclesiam, the issue was, whether it had baptisterium et sepulturam; for if it had the administration of sacraments and sepulture, it was in law adjudged a church." In this chapel, in addition to these rites, was marriage performed also, which affords a strong presumption of its being a parochial chapelry, for a priest marrying out of the parish church or a parochial chapel was liable to be suspended: 1 Gibs. Cod. 429, 2nd edit. The language of the Marriage Acts, 26 Geo. 2, c. 33, s. 1, and the 4 Geo. 4, c. 76, s. 3, shews that the ceremony of marriage was to be performed in chapels having parochial rights. It is said, in Degge's P. C. 277, in speaking of chapels of ease, that "some of them have parochial rights to christen and bury, and are therefore called parochial chapels, by way of distinction from others that have no such privilege; and these differ in nothing from churches, but in want of rectories and endowments, the mother being to be served be-

fore the daughter." And he adds, "Those chapels of ease which are not parochial cannot bury or christen, but are only used for the ease of the parishioners, to hear the Word of God read and preached, and to join in prayers." It will be contended by the defendant, that the chapel having passed by the deed of feoffment, in the time of James the First, to certain trustees, shews that at that time it was a mere chapel of ease at the most; but it is rather evidence of its having existed at that time as a chapelry. The right to bury at the parish church is not inconsistent with the plaintiff's argument. In *Gibs. Cod.* 221, s. 7, it is said, "The inhabitants of a precinct where it is a chapel (though it is a parochial chapel, and though they do repair it), are of common right contributory to the repairs of the mother church. And if they have seats at the mother church, to go thither when they please, or receive sacraments or sacramentals, or marry, christen, or bury at it, there can be no pretence for a discharge," &c. *Wise v. Creech*(a) is to the same effect. There were no chapel-wardens, nor chapel rates; but it does not appear that any rates were required, and that may be owing to the circumstance, that the trustees would undertake the repairs of the chapel. By the Rubric, the sacramental bread and wine are to be found at the charge of the parish. With respect to the remaining portions of evidence, the admission of which is to depend upon the opinion of the Court, the plaintiff does not object to their admission; but not much weight can be attached to them, as Mr. Finch did eventually visit the sick, although it was contrary to the opinion which was given by the proctor.

Crompton, contra.—The plaintiff is not entitled to these fees. This district of St. Helen's never was a parochial chapelry. The history of the chapel may be considered

1850.
CARR
v.
MOSTYN.

(a) 2 Lev. 186.

1850.
 CARR
 v.
 MOSTYN.

with reference to three periods: First, the 11th of James I; secondly, the time of the augmentation by Queen Anne's Bounty, in 1716; and thirdly, the consecration, which took place in the year 1816. It is impossible for this district to have been a parochial chapelry at the time the property was passed by the deed. Certain trustees, who were lay persons, were enfeoffed, and livery of seisin was made to them. The chapel could not have been consecrated at that time. There is no trace whatever of this chapel having possessed any ecclesiastical jurisdiction until the time of Queen Anne. The trusts created by the deed are quite inconsistent with the chapelry having been independent. All matters with reference to the chapel, and possessing anything of an ecclesiastical nature, were to be done by the trustees. The repairs of the chapel are provided for by the deed: the appointment of a fit person to read divine service, and the rules and regulations for the proper government of the chaplain, and for the appointment of pews, are all evidence of its having been at that time a mere chapel of ease. There is no provision in the deed which would preclude the appointment of a nonconformist. The chapel had no ancient registers. The right of burial was not an absolute one. The fact that marriages were solemnised there has no weight. The case of *Rex v. Northfield*(u) shews that marriages were formerly celebrated in many chapels which were not parochial. The registers shew that more christenings, marriages, and burials were performed at Prescott, of persons from the district of St. Helen's, than there were from St. Helen's itself. It also appears by the registers of the parish, that three of the preachers at St. Helen's chapel were *nonconformists*, and that this was after the Act of Uniformity. The appointments of the several incumbents were not under seal, both of which circumstances are strong evidence that this cha-

(u) 2 Dougl. 659.

pel was not a benefice at that period. The fact that the minister of the chapel had recourse to the registers of the mother church is another strong presumption in the defendant's favour. The register of births was kept there under the provisions of the stats. 6 & 7 Will. 3, c. 6, s. 52, and 7 & 8 Will. 3, c. 35. There is no evidence whatever, previous to the stat. 1 Geo. 1, c. 10, of its having been a parochial chapelry, and the 2nd section of that Act refers to officiating ministers according to the rites of the Church of England, as to parsons, vicars, and curates; and therefore, the augmentation by Queen Anne's Bounty does not carry the case further. The consecration in 1816 is against the presumption of the chapel having been previously consecrated. It is said in Burn's Eccl. Law (a), that "a church once consecrated may not be consecrated again. To which general rule of the canon law one exception was, unless they be polluted by the shedding of blood; and in that case the canon supposes a reconsecration, though the common method in England was a *reconciliation* only, as appeareth by many instances in our ecclesiastical records." There were no chapel-wardens until the consecration in 1816; the ancient usage, therefore, contradicts modern reputation. The passage quoted from the 2nd Inst. 363 is denied to be law by Sir G. Lee, in *Line v. Harris* (b). [He also cited the following authorities, to shew what had been considered necessary to constitute a parochial chapelry:—*Dixon v. Kershaw* (c), *Attorney-General v. Brereton* (d), *Craven v. Sanderson* (e), *Jones v. Ellis* (f), *Doe d. Brammall v. Collinge* (g), *Reg. v. Clayton* (h), *Moysey v. Hillcoat* (i), *Ball v. Cross* (k), and *Farnworth v. The Bishop of Chester* (l).]

1850.
CARR
v.
MOSTYN.

(a) Vol. 1, p. 336, 9th edit.

(b) 1 Sir G. Lee, 155.

(c) Amb. 528.

(d) 2 Ves. sen. 425.

(e) 7 A. & E. 880.

(f) 2 Y. & J. 265.

(g) 7 C. B. 939.

(h) 18 L. J., M. C., 129.

(i) 2 Hagg. Eccl. R. 30.

(k) 1 Salk. 164.

(l) 4 B. & C. 555.

1850.
 CARR
 v.
 MOSTYN.

Cowling, in reply.—This chapelry is a parochial one within the meaning of the 1 & 2 Will. 4, c. 38, s. 14, if it has always been considered as one de facto. The several parochial rites which were there celebrated are sufficient evidence of its having always been a parochial chapelry. Thus, the right of burial is such evidence: Com. Dig. "Cemetery" (B.), Burial. So, the fact of marriage being celebrated there is evidence of its being a district: Canons, A.D. 1604, Can. 62; see also Watson's Clergyman's Law, p. 318. With respect to the deed, it may be that some of its provisions were void. The fact that a nonconformist was an incumbent of the chapel is not of much weight. It is therefore submitted, that, under all the circumstances set forth, the plaintiff is entitled to retain the verdict.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The principal question in this case is one of fact, on which we have, very reluctantly, to perform the duty of a jury.

There are three preliminary questions as to the admissibility of evidence, which are easily disposed of.

The action is brought by the incumbent of the chapel of St. Helen's, to recover from the defendant, the incumbent of the district church of St. Thomas, erected within the alleged limits of the chapelry, under the provisions of the 1 & 2 Will. 4, c. 38, a moiety of the fees, dues, and offerings, received by the defendant. By the 14th section of that statute, the fees, dues, offerings, and emoluments, of right or custom belonging to the incumbent of the parish, chapelry, or place in which the newly erected church is situate, are to be received on account of such incumbent, except such part as the commissioners, with the consents of the bishop, the patron, and the incumbent in some cases, and the bishop alone, with the consent

of the patron and incumbent, in others, shall assign to the minister of the district church.

In this case the bishop, in October, 1839, assigned one-half of the fees to the minister, and the other to the vicar of the parish. It is clear that that appropriation was wholly void, the bishop having had no jurisdiction, except to assign a portion to the incumbent of the district church.

This moiety the plaintiff seeks to recover, on the ground that the district was taken out of a chapelry, whereof he was incumbent.

In order to make out this case, he must establish two propositions: First, that the alleged chapelry of St. Helen's was a legal parochial chapelry, and therefore immemorial.

In our judgment, it is not enough to prove that there was a district which was a parochial chapelry *de facto*, and that, of late years, the services in respect of which fees are claimed, were usually performed in the chapelry. The Act gives the fees to the incumbent of the chapel of the chapelry, only if they were legally due and the district was a legal one.

Secondly, that there were fees due to him of right and custom, for the same services which the minister of the district church performed.

To establish or contradict the first of these propositions, a great deal of evidence was given on the trial, to three parts of which objections were taken, which we ought first to dispose of, because, in our capacity as a jury, we ought to consider the legal evidence alone.

The first piece of evidence disputed, was that of a statement by one of the witnesses, that he had heard from a former incumbent of St. Helen's, that the people of four townships, and of one in the parish of Winwick, came to the chapel. The rights of this chapel are sufficiently of a public nature, to make reputation admissible; and this appears to us to fall within this description.

The second piece of evidence was a case stated by a

1850.
CARR
v.
MOSTYN.

1850.
 CARE
 v.
 MOSTYN.

deceased incumbent, Mr. Finch, for the opinion of a proctor, in which the rights to pews, and to christenings, and to burials, in a qualified way, and the nature of the repairs and other matters, are enumerated.

This appears to us to be admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate is admissible.

The third document objected to, was the answer of the incumbent of St. Helen's and other clergymen, to questions sent by the Bishop of Chester, for the information of the Governors of Queen Anne's Bounty, at the time when the curacy was augmented in the year 1825. These were objected to, but we think they ought to be received. The stat. 1 Geo. 1, c. 2, s. 10, directing each bishop to make inquiries as to the value of the benefice, and how it arose, and other circumstances thereof, the answers are evidence on the same principle, that an inquisition on some public matter is.

Upon all the evidence, including the three portions thus objected to and received, the question is, whether the chapelry is proved to be parochial; and to be so, it must have been coeval with the parish, that is, immemorial.

No doubt this may be inferred from modern usage, as far back as human memory goes, if there be no evidence to the contrary, according to the well-established rule by which ancient rights and exemptions are supported. And certainly there is a considerable quantity of evidence, for many years back, of the chapel having had some parochial rights. It has had baptisms, marriages, and burials, as appears by the registers, which go back as far as 1713, for the inhabitants of several townships and parts of townships, in the parish, and part of one out of it. It is called a chapelry in a faculty of 1816, and in two entries of consecration of burying ground, in the same year, as well as in the answers to the bishop's questions prior to the augmentation of the curacy in 1825; and there is parol evidence of several witnesses to the same effect.

1850.
CARR
v.
MOSTYN.

On the other hand, the evidence of rights of sepulture, which Lord *Hardwicke* considers to be a most strong circumstance, is in this case much weakened by the statement of Mr. Finch, that those who had *breadth of ground* in the churchyard buried there. The absence of chapel-wardens till very modern times (1816), and the total absence of chapel rates at all times; the statements of Mr. Finch, inconsistent with the existence of a regular chapelry, though less entitled to weight, because he had some interest to avoid the trouble of visiting the sick belonging to it, afford some arguments against this being a parochial chapelry. The presumption arising from the fact of marriages having been celebrated long ago in this chapel, is weakened by the other fact, that marriages of the inhabitants of the alleged district or chapelry have been very frequently celebrated in the mother church; and the statement of Mr. Finch, the late incumbent, is rather at variance with the supposition that this was a parochial chapelry.

But as we go back to the earlier history of the chapel, we find most cogent reasons for believing, that there was no chapel with any parochial rights in the beginning of the seventeenth century.

The deed of feoffment of the 11 Jac. 1, conveys the site of the chapel to trustees, and a schedule accompanies the deed, declaring the trusts to be, that divine service may be continued in the chapel, which is to be repaired for the use of the neighbouring inhabitants, and the trustees are to elect lawful and fit persons to *read divine service in the chapel*.

Not a word is said of the administration of the sacraments in this chapel, which would assuredly have been the case, if at that time the chapel had possessed parochial rights.

This deed creates a very strong impression that this chapel was then only a private chapel, or, at most, a chapel of ease.

1850.
CARR
v.
MOSTYN.

This opinion is somewhat strengthened by the evidence of the parochial registers of the mother church, which contain entries of marriages, births, and burials of the inhabitants of the townships now alleged to constitute the chapelry. By the 6 & 7 Will 3, c. 6, registers are to be kept by the incumbents of parishes and precincts, in order to the better levying duties granted upon the registration. These registers in 1701 included all in the parish; if there had been a precinct or chapelry, it would not then have been so.

Again, in one of these registers of the parish, which was admitted in evidence, by consent, there is a statement, that, in the year 1677, the incumbent of St. Helen's was a nonconformist, and was called a preacher. I own I think this circumstance is of considerable weight, to shew that this chapelry was not then a benefice, for it is well known that nonconformists were in great numbers removed from their benefices by the Act of Uniformity, but a nonconformist continuing in a chapel, affords a presumption that it was not then a benefice.

Upon the whole, in our character of a jury we are far from satisfied that this is a legal parochial chapelry with any parochial rights. On the contrary, our opinion is that it is no more than a chapel of ease: and therefore the judgment is for the defendant.

Judgment of nonsuit.

1850.

WILKINSON v. CANDLISH, Executor of WILLIAM CANDLISH.

Feb. 9.

COVENANT on an indenture, dated the 17th of December, 1836, made between J. Candlish and W. Candlish of the one part, and the plaintiff of the other part, for payment to the plaintiff of 1000*l.* and interest, on the 17th of December, 1840.—Breach, non-payment. Plea, payment.

At the trial, before *Wightman*, J., at the Durham Summer Assizes, 1849, it appeared that the plaintiff, being desirous of putting out at interest the sum of 1000*l.*, applied for that purpose to one Davison, a solicitor at Sunderland, who, on behalf of the plaintiff, advanced it to J. Candlish on the security of the above indenture, which, after reciting (amongst other things) that J. Candlish was possessed of certain copyhold premises, contained a covenant by him to surrender these premises to the use of the plaintiff. No surrender was, however, made. Davison, who acted as attorney for both parties, signed the receipt for the money. The title deeds were delivered to Davison, and he prepared a schedule of them, at the foot of which was the following memorandum:—"I hereby acknowledge to have this day received into my custody and possession the several deeds and writings specified in the above schedule, and I do hereby undertake to deliver the same safe and uncanceled (unless prevented by fire or other inevitable accident), upon payment to me of the sum of 1000*l.* and interest. 17th December, 1836. (Signed) W. C. Davison." This document was delivered by Davison to J. Candlish, but not in the presence or with the knowledge of the plaintiff. The mortgage deed remained, with the

The plaintiff lent to the defendant 1000*l.*, upon the security of an indenture, which contained a covenant by the defendant to surrender certain copyhold premises to the plaintiff's use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, and the title deeds were delivered to him, and he prepared and delivered to the defendant, but without the plaintiff's knowledge, a schedule of the deeds, at the foot of which was a memorandum signed by D., acknowledging the receipt of the deeds, and undertaking to deliver them up on payment of the principal money and interest. The mortgage deed remained in D.'s possession, and he from time to time re-

ceived the interest and paid it over to the plaintiff. The principal money was paid to D., who appropriated it to his own use, and died insolvent:—*Held*, first, that D.'s receipt for the principal, and the memorandum signed by him, were admissible in evidence for the defendant. Secondly, that neither the possession of the mortgage deed nor the receipt of interest was any evidence of an authority to D. to receive the principal, and consequently, that the plaintiff was entitled to recover it from the defendant.

1850.
WILKINSON
v.
CANDLISH.

plaintiff's assent, in the possession of Davison, and some letters from the plaintiff to him were in evidence, which, it was contended, authorised him to receive the interest, which he accordingly did, and duly paid it over to the plaintiff. The principal money was paid by J. Candlish to Davison in different sums at various times, but without the plaintiff's knowledge; and upon payment of the whole, Davison delivered up the deeds, and, having appropriated the money to his own use, died insolvent. The present action was brought against the defendant, as executrix of W. Candlish, who was surety for J. Candlish, to recover the amount of the principal money. The defendant tendered in evidence the receipt of Davison of the mortgage money and the schedule and receipt of the title deeds. This evidence was objected to, but received by the learned Judge. It was then submitted, on the part of the defendant, that he was entitled to the verdict, on the ground that, the mortgage deed having been allowed to remain in the possession of Davison, and he being authorised to receive the interest, there was an implied authority for him to receive the principal. The learned Judge directed a verdict for the defendant, reserving leave for the plaintiff to move to enter a verdict for him, if the Court should be of opinion that, under the circumstances, he was entitled to recover.

A rule nisi having been obtained accordingly,

Martin and *Unthank* shewed cause.—The first question is, whether the receipt for the mortgage money, and the schedule and receipt of the title deeds, were admissible in evidence. There is no doubt they were, on the ground that they formed part of the same transaction. Secondly, the repayment by the mortgagor to Davison was a payment to the plaintiff, for the deposit of the mortgage deed with Davison constituted a sufficient authority for him to receive the money. The rule of law, as adopted by the text

writers, is stated in *Whitlock v. Waltham* (a), decided in Hilary Term, 7 Anne. There "the interest of a mortgage was paid to and received by the scrivener that put out the money; the scrivener proved insolvent, and the question was, who should bear the loss. And it was admitted in this case, first, that if the scrivener be intrusted with the custody of the bond, he may receive the interest, and though he fails, yet the mortgagee shall bear the loss; and that so it is also in such case, if he receive the principal and deliver up the bond; for, being intrusted with the security itself, it shall be presumed that he is intrusted with a power over it, and with a power to receive the principal and interest; and the rather, because the giving up of the bond upon the payment of the money is a discharge thereof; otherwise, if the obligee take away the bond, for then he hath no authority to receive the money. Secondly, if a scrivener be intrusted with the mortgage deed, not the bond, he hath only authority to receive the interest, but not the principal, because the giving up the deed is not sufficient to restore the estate, but there must be a re-conveyance, whereas the giving up a bond is in law an extinguishment of the debt." Here no re-conveyance was necessary, for the estate never vested in the mortgagee. [*Parke, B.*—There is a covenant to surrender, which must be released; and what authority has the attorney to release it?] The covenant created a mere equitable interest, which ceased on the payment of the principal money, and the delivery of the deed to the mortgagor. [*Parke, B.*—No doubt it would be a good answer to a covenant for payment of a sum certain, that the covenantor had paid the party in whose possession the deed was, and received the deed from him, for a covenant of that description is within the 4 Anne, c. 16; but the same rule does not apply to cases where, in order to discharge the obligation, something else

1850.
WILKINSON
v.
CANDLISH.

(a) 1 Salk. 157.

1850.
 WILKINSON
 v.
 CANDLISH.

must be done. For that reason, it does not apply to a mortgage, nor to the present case, because there must be a release of the covenant to surrender. *Alderson, B.*—The distinction between a mortgage and a bond is not merely formal, because in the latter case, if the bond be given up, nothing more remains to be done; but that is not so in the case of a mortgage, because there another act is to be done, which would bring the fact of payment to the knowledge of the principal. So here, if, when the money was paid, Candlish had required the plaintiff to release the covenant, the plaintiff would have asked Davison why such a request was made, and would have been told in answer, that he Davison had been paid the money. Therefore, in justice as well as law, the rule as to bonds ought not to apply to mortgages. *Rolfe, B.*—*Whitlock v. Waltham (a)* is perfectly good law; but that decision arose out of a profession which does not now exist, the functions of a scrivener having in modern times been divided into that of a banker and attorney. In former times, money was left in the hands of a scrivener, who laid it out at interest, and probably never consulted his client about it. Here the money was not intrusted to Davison; he was only employed to look out for some one who had money to lend.] In the case of *Wolstenholm v. Davies (b)*, which was decided before the 4 Anne, c. 16, the Master of the Rolls said, “that it was the constant rule of the Court, that if the party to whom the security was made, trusted his security in the hands of the scrivener, payment to the scrivener was good payment.” *Vandeleur v. Blagrove (c)* does not affect the present question. There the grantor of an annuity intrusted a person, who acted as agent of both parties, with a sum of money, for the purpose of redeeming it. The agent, without paying the money, obtained from the grantee a release of the annuity, and it was held that the loss must be

(a) 1 Salk. 157.

(b) 2 Freem. 289.

(c) 6 Beav. 565.

1850.
 WILKINSON
 v.
 CANDLISH.

borne by the grantor. Here the fact of the security having been allowed to remain in the hands of Davison for years is evidence of an authority to receive payment of the principal money. In addition, the circumstances of the case shew an actual authority. Davison from time to time received the interest, and there was an agreement whereby the delivering up of the deeds, and the payment of the 1000*l.*, were to be cotemporaneous acts; but the plaintiff allowed the deeds to remain in the hands of the person to whom the payment was to be made. [*Parke, B.*—The observation of the Master of the Rolls, in *Wolstenholm v. Davies* (a), respecting the payment of interest, applies here. He says, "And although in this case the scrivener had received the interest and part of the principal, and paid it to the obligee, yet that did not imply that he had any authority to receive it, but as long as he paid it over, all was well, and any one else might have carried to the party as well as he." So here, Davison is either the agent of the mortgagee to receive the interest, or the agent of the mortgagor to pay it; but if the plaintiff gets the money, it is no matter from whom it comes, whether from the debtor or a stranger. That shews that an authority to receive the interest is no evidence of an authority to receive the principal.] Davison was allowed to retain the deed, and if he had altered it in a material point, it would have become void: *Pigot's case* (b), *Davidson v. Cooper* (c). The delivering up of the deed for the purpose of putting an end to the mortgage has the same effect. The continued possession of the deeds, and the authority to receive the interest, is *primâ facie* evidence that Davison was agent for the purpose of receiving the principal: *Story on Agency*, s. 98; *Owen v. Barrow* (d).

(a) 2 Freem. 289.

(b) 11 Rep. 26b.

(c) 13 M. & W. 343.

(d) 1 N. R. 101.

1850.
WILKINSON
v.
CANDLISH.

Watson and Digby Seymour, contra, were not called upon to argue.

PARKE, B.—The rule must be absolute. The first question is, whether the schedule of the deeds delivered to Davison, and signed by him at the time the mortgage was executed, was receivable in evidence. Now, that document either binds Wilkinson personally, or it binds Davison. If it be considered as the act of Wilkinson binding himself, there is no question that it is receivable in evidence as part of the same transaction. If, on the other hand, it is to be considered as the act of Davison only, it is admissible on the principle that the act of a deceased person charging himself is receivable in evidence.

The question then is, what is the effect of that paper. If it was meant to be a contract with Davison, that, upon payment of the mortgage money to him, as distinguished from Wilkinson, the deeds were to be delivered up to the mortgagor, and the plaintiff knew that, it would be some evidence of an authority to Davison to receive the money. But there is no evidence that the plaintiff was present at the time the paper was signed, still less that he was cognisant of the contents of it. Therefore, supposing that to be the true construction of the document, so far there is no evidence against the plaintiff. Then, is there any other evidence to shew that Davison was authorised to receive the principal money? Some letters were relied upon as shewing that Wilkinson gave an authority to Davison to receive the interest, and that, no doubt, was a matter for the consideration of the jury; but an authority to receive the interest of a mortgage by no means imports an authority to receive the principal. A person may be willing to trust another so far as to allow him to receive a small sum, but not a large one. Then the defendant relies upon the fact of the deed, which contains a covenant to surren-

1850.
 WILKINSON
 v.
 CANDLISH.

der the copyhold, having been left in the custody of Davison, as constituting a sufficient authority for him to receive the principal money; and in support of that proposition the cases of *Whitlock v. Waltham* and *Wolstenholm v. Davis* were cited. Those, however, were cases of scriveners; and in the year 1702 (when the business of a scrivener was better known than now) there was a case of *Martyn v. Kingsly*(a), in the Court of Chancery, in which it is said, "A difference was made where a man trusts his scrivener (who puts out money for him) with the custody of his bond, and where with the custody of his mortgage; in the first case, if he receive the money and delivers up the bond, this shall bar the obligee; not so in the case of a mortgage, because a legal estate is vested, which cannot be divested without assignment." But, as my Brother *Rolfe* observed, the business of a scrivener has in the present day been transferred to bankers and attornies. In the Bankrupt Act, 21 Jac. 1, c. 19, s. 2, the words are, "every person who shall use the trade or profession of a scrivener, receiving other men's monies or estates into his trust or custody." A scrivener's business was to receive other men's money, and lay it out at interest, and then to receive it back again and keep it in his hands, and then to lay it out again at interest. So that the fact of intrusting a security for money in the hands of such a person was evidence of an authority to receive the principal money. That such was the business of a scrivener appears from the case of *Ex parte Malkin* (b), before Lord *Eldon*, and also at *Nisi Prius*. Here there is no evidence to show that Davison was a scrivener in the proper sense of the word; and those cases, if they are to be considered good law, apply only to scriveners dealing with the money of their clients. But in the case of a mortgage deed deposited with a scrivener, where he clearly could not reconvey the estate, the same rule did not apply. Whether

(a) Prec. in Ch. 209. (b) 2 Rose, 27, 28; 2 V. & B. 31.

1850.
WILKINSON
v.
CANDLISH.

there is any difference in the law before the statute of Anne, and since, it is unnecessary to decide. Neither is it necessary to decide what the law was, where a bond was put into the hands of a third party not a scrivener; nor whether this instrument, which is partly in the nature of a bond and partly an equitable mortgage, ranges within the one class or the other, because it contains a covenant to surrender, which could not be released except by the covenantee. The next question is, whether there is any evidence of an authority to Davison to receive the principal money; and I can see none. There is nothing but an authority for the payment of interest to him, and that is no authority for him to receive the principal.

ALDERSON, B., concurred.

ROLFE, B.—I am of the same opinion. With regard to the cases cited as to scriveners, all that is meant is, that, if a scrivener puts out money at interest in his own name, payment to him is of course good payment; but if, instead of putting out the money in his own name, he puts in the name of his client, but holds the bond, he is entitled to receive the interest, for that is taken to be the same thing as if he were dealing with it in the way of his trade.

PLATT, B., concurred.

Rule absolute.

1850.

HENDERSON and Others, Official Managers of The North of England Joint-stock Banking Company, *v.* STOBART. *Feb. 9.*

ASSUMPSIT by the official managers of the North of England Joint-stock Banking Company for winding up the said Company.—The declaration stated, that, before the making of the promise, &c., one G. Burdis had been public officer of the said Company, and that an action had been commenced by Burdis against one F. Todd and W. Todd, for the recovery of the amount of a bill of exchange, drawn by F. Todd and W. Todd upon the owners of the Trindon Colliery, and accepted by the defendant for himself and the other owners of the colliery, for 1250*l.*, and indorsed to the banking Company; that, whilst the action was so pending, it was agreed between the Banking Company, W. Todd, F. Todd, and the defendant, that the action should be settled as follows:—250*l.* by the promissory note of W. Todd and F. Todd, 500*l.* by the promissory note of W. Todd and F. Todd, and 500*l.* to be paid by the defendant's promissory note of 500*l.*, at twelve months, the defendant consenting to the North of England Banking Company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to

A declaration stated, that an action had been commenced by the public officer of a banking copartnership against T., for the recovery of the amount of a bill of exchange drawn by him upon and accepted by the defendant for 1250*l.*; that, while the action was pending, it was agreed between the Company, T., and the defendant, that the action should be settled as follows:—250*l.* and 500*l.* by the promissory notes of T., and 500*l.* by the defendant's promissory note at twelve months, the defendant

consenting to the Company appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities, the Company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on and the 1000*l.* bill received on account of the said bill. The declaration then stated mutual promises, and averred that the Company had performed all things on their part to be performed, and had always been ready and willing to settle the action, &c. Breach, that the defendant did not nor would give the Company the promissory note for 500*l.* nor the said power of sale. Plea, that the defendant entered into the agreement jointly with M., B., and J., and that, after breach of the agreement, by an indenture made between the nominal plaintiffs in this action (one of whom was the public officer of the Company) of the first part, the directors of the Company of the second part, the defendant, M., B., and J., of the third part, and T. of the fourth part, the public officer, on behalf of the Company, did remise, release, and for ever discharge the said M., B., and J., of and from the said action, and all actions and suits, causes of action, and debts whatsoever, without the consent of the defendant, and thereby released the defendant from the same:—*Held*, first, that the indenture set out in the plea did not operate as a release, but only as a covenant not to sue.

Secondly, that the agreement set out in the declaration was a binding engagement and not a mere accord, inasmuch as it would have been broken if the Company had proceeded with the original action, a new person having been made a party to the contract.

1850.
 HENDERSON
 v.
 STOBART.

give them a power to sell the properties mentioned in the securities, the Company to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and the 1000*l.* bill received on account of the said bill. The declaration then stated mutual promises, and averred, that, although the Banking Company had performed all things in the said agreement on their part to be performed, and had always been ready and willing to settle the said action, and to forego all interest on receiving the three notes, and to guarantee to give up the bill sued on, and the 1000*l.* bill received on account of the said bill, yet the defendant did not nor would give to the Banking Company such promissory note for 500*l.*, nor such power of sale, &c.

Pleas, first, non assumpsit. Secondly, that it was not agreed between the Banking Company, W. Todd, F. Todd, and the defendant, modo et formâ. Lastly, that the defendant entered into the agreement and made the said promises, as one of the owners of the Trindon Colliery, jointly with M. Beverley, B. Beverley, J. Brooke, &c., then being owners of the said colliery; that, after the said breach of the agreement in the declaration mentioned, to wit, on &c., by an indenture then made between the said G. Burdis, J. Henderson, and J. Ross, the nominal plaintiffs in this action, of the first part, E. Robson, &c., directors of the Banking Company, of the second part, and the defendant, the said M. Beverley, B. Beverley, &c., of the third part, and W. Todd and F. Todd of the fourth part, the said G. Burdis, on behalf of the said Banking Company, did remise, release, and for ever discharge the said M. Beverley, B. Beverley, J. Brooke, &c., as owners of the colliery, or partners of the said Coal Company, and as drawers, acceptors, and indorsers of the said two bills of exchange, of and from the said action, and all actions and suits, causes of actions, and debts whatsoever; whereby the said North of England Banking Company, without the consent of the defendant, released to the said M. Beverley, B. Beverley,

and J. Brooke, &c., all causes of action, claim, and demand in respect of the said promise in the declaration mentioned, and thereby released the defendant from the same.—Verification. Replication, non est factum.

1850.
HENDERSON
v.
STOBART.

At the trial, before *Patteson*, J., at the Newcastle Summer Assizes, 1849, it was objected, on behalf of the defendant, that the agreement set out in the declaration was a mere accord unexecuted, upon which no action would lie. It was also objected, on behalf of the plaintiffs, that the indenture set out in the last plea was improperly pleaded as a release, since it only operated as a covenant not to sue. The learned Judge directed a verdict for the plaintiffs, for 543*l*. 15*s.*, reserving leave for the defendant to move to enter a verdict for him, on the first, second, and last issues.

A rule nisi having been obtained accordingly, or to arrest the judgment,

Martin and *Hugh Hill* shewed cause.—The plaintiffs are entitled to retain the verdict. The indenture mentioned in the last plea did not operate as a release, but only amounts to a covenant not to sue: *Solly v. Forbes* (a). The replication “non est factum” not only puts in issue the fact of the execution of the indenture, but also its legal operation: *North v. Wakefield* (b). [*Parke*, B.—The question is, whether the declaration is good.] It is conceded that no action will lie upon an accord unexecuted: *Lynn v. Bruce* (c), *Reniger v. Fogossa* (d); but this declaration does not state that which merely amounts to an accord, for the Company are to give up something besides the action. An accord is an agreement between the parties to the original contract, but here the defendant was no party to the action. This is a new agreement, which, if carried out, would prevent the Company from proceeding with the ac-

(a) 2 B. & B. 38.

(b) 18 L. J., Q. B., 214.

(c) 2 H. Bl. 317.

(d) Plowd. 6.

1850.
 HENDERSON
 v.
 STOBART.

tion. The general averment of performance by the Company of their promises is good after verdict: *Varley v. Manton* (a), *Kemble v. Mills* (b). Mere forbearance is a sufficient consideration to support an agreement. In Com. Dig. "Action upon the Case upon Assumpsit," (B 2), in treating of what will be a good consideration, it is said, "So in consideration of surceasing his suit, for that is a benefit to the defendant, and a prejudice to the plaintiff, though the action is not discharged." This is tantamount to an agreement by the Company to forbear their suit, which they have done on the faith of the defendant being a party to the agreement. The other debtors signed the agreement as well as the defendant, and it would be a fraud on them, if he were not bound by it. *Good v. Cheesman* (c) shews that an accord with mutual promises is binding, though unexecuted. In *Wilkinson v. Byers* (d) it was held, that the payment by the defendant of an agreed sum, in discharge of an action for an unliquidated demand, was a good consideration for a promise by the plaintiff to stay proceedings and pay his own costs; and *Littledale, J.*, expressed an opinion that such an agreement would be binding, even in the case of a liquidated demand, on the authority of *Reynolds v. Pinhowe* (e). [*Parke, B.*—That was in effect an accord executed.] This is not like the cases of *Tattersall v. Parkinson* (f), and *Down v. Hatcher* (g), where the defence set up was the payment of a less sum in satisfaction of a greater, but it comes within the principle of the decision in *Sibree v. Tripp* (h). [They also referred to *Smith v. Holmes* (i).]

Knowles and Unthank, in support of the rule.—This

(a) 9 Bing. 363.

(b) 1 M. & G. 757.

(c) 2 B. & Ad. 328.

(d) 1 A. & E. 106.

(e) Cro. Eliz. 429.

(f) 16 M. & W. 752.

(g) 10 A. & E. 121.

(h) 15 M. & W. 23.

(i) 10 Jur. 862.

agreement is a mere accord, and had no effect in putting an end to the original action. *Good v. Cheesman* proceeded on the ground that the agreement amounted to a valid new contract between the other creditors and the debtor, capable of being immediately enforced. The test in these cases is, whether the parties intended to accept the agreement as a satisfaction, or the performance of it. This declaration in terms alleges a performance, but is accompanied with language which shews that the agreement has not been performed; for it is averred that the Company were "ready and willing to settle the action," &c. It is plain, therefore, that the parties did not rely upon the agreement, but upon the performance of it; and that distinguishes this case from those cited, and brings it within the rule, that an accord unexecuted is no satisfaction: *Carter v. Wormald* (a). This agreement could not have been pleaded in bar of the original action, if it had been proceeded with: *Flockton v. Hall* (b), *Bayley v. Slooman* (c). [*Parke, B.*—There is a new party to the agreement; it is as if the Company had said to the defendant, "If you will become a party, and pay us 500*l.*, we will agree to stay proceedings in the action."] *Ford v. Beech* (d) decided that there can be no suspension of a right of action.—The indenture mentioned in the last plea is, both in terms and effect, a release. [*Parke, B.*—The instrument must be construed in some way, so as to give a right of action on the agreement.] Suppose the Company had again sued on the original bill, and the defendant had pleaded the indenture of release, how could the Court see, on the face of the deed, that it was only a covenant not to sue? [*Parke, B.*—Every deed must be construed with reference to the subject-matter. We cannot tell to what extent the instrument is to operate, until we see the agreement, and

1850.
 HENDERSON
 v.
 STOBART.

(a) 1 Exch. 81.

(c) 3 Bing. N. C. 915.

(b) 19 L. J., Q. B., 1.

(d) 11 A. & E. 852.

1850.
 {
 HENDERSON
 v.
 STOBART.

then we must construe it, though in form a release, as a covenant not to sue, in order to give effect to the agreement.]

PARKE, B.—The rule must be discharged. We are satisfied that this is an agreement which would have been broken if the Company had gone on with the original action; for, a new person being made a party to the contract, it becomes a binding engagement, and not a mere accord. With respect to the point as to the release, we have already disposed of it. The indenture must be construed as a covenant not to sue upon any other document than the agreement set out in the declaration, and consequently cannot be pleaded as a release, though it is so in terms.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

Feb. 11. JONES and Others, Executors of D. JONES, v. JOSEPH HUGHES and JOHN EVANS.

A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by the plaintiff upon the security of a promissory note payable to him, or bearer, on demand, with interest, and

ASSUMPSIT on a promissory note made by the defendants, dated the 1st of May, 1830, for payment to the plaintiff's testator, David Jones, or bearer, on demand, of 185*l*. and interest.—Plea, the Statute of Limitations.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1849, it appeared that in January, 1830, at a vestry meeting of the parish of Llanrhos, in the county of Carnarvon, it was resolved that twelve almshouses be built by the parish, and that the churchwardens and overseers

signed by the defendants thus:—"J. H., churchwarden, J. E., overseer, or others for the time being." The interest had been regularly paid by the overseers for the time being up to 1847, but the defendants had never paid the interest, or in express terms authorised the parish officers to pay it for them. The defendants having pleaded the Statute of Limitations to an action on the note—*Held*, that it was a question for the jury, whether, by the form of the note, the defendants had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute.

should raise the funds for that purpose by loan. The plaintiff's testator, D. Jones, advanced some of the money upon the security of the following promissory note signed by the defendants, then being two of the parish officers.

1850.
JONES
v.
HUGHES.

"Llanrhos, 1st May, 1830.

"£185.—We promise to pay to David Jones or bearer, on demand, the sum of One hundred and eighty-five pounds, with interest thereon from the first day of May, 1830, at the rate of 5*l.* per centum per annum, for value received, to build twelve almshouses at Towyn.

"JOSEPH HUGHES,	} Churchwardens.	{ "Or others for the time being."
"E. ROBERTS,		
"JOHN EVANS,	} Overseers.	
"W. EVANS, X his mark.		
"Witness—J JONES.		

Interest on this note had been regularly paid by the overseers for the time being, up to 1847, and by them debited to the parish. The defendants had never paid any interest on the note, nor in express terms authorised the parish officers to pay it for them. Under these circumstances the learned Judge told the jury, that the defendants were entitled to a verdict, if the payment was made without their knowledge or authority. A verdict having been found for the defendants,

Watson, in last Michaelmas Term, obtained a rule nisi to set aside the verdict and for a new trial, on the ground of misdirection, against which

Martin and *Cowling* now shewed cause.—Under the 9 Geo. 4, c. 14, s. 1, in order to take a case out of the Statute of Limitations, the payment must be of such a nature as to amount to an admission of an existing debt. "Here the question was left to the jury, who found that the in-

1850.
JONES
v.
HUGHES.

terest was paid without the knowledge or authority of the defendants. [*Parke, B.*—The case of *Rew v. Pettet* (a) is in point.] There *Littledale, J.*, says, "It was a question for the jury, whether the defendants had adopted the payment of the interest as made on their behalf." [*Parke, B.*—Here a jury might infer, from the very form of the note, that the defendants constituted the churchwardens and overseers for the time being their agents for the purpose of paying the interest.] *Rew v. Pettet* proceeded on the ground, that there were other collateral facts showing that the defendants recognised the parish as their agents. [*Parke, B.*—Here there was certainly evidence for the jury, though it might be explained, and the learned Judge ought not to have withdrawn from the consideration of the jury the form of the note.]

Watson appeared in support of the rule, but was not called upon.

PER CURIAM (b).—The rule must be absolute.

(a) 1 A. & E. 196.

(b) *Parke, B., Alderson, B. Rolfe, B., and Platt, B.*

1850.

Feb. 12.

DOE. *d.* BAILEY and Others *v.* SLOGGETT.

EJECTMENT for certain premises situate in the borough of Plymouth.

At the trial, before *Cresswell, J.*, at the Devonshire Summer Assizes, 1849, it appeared that the lessors of the plaintiff were the children of Charles Bailey, William Bailey, and John Bailey, mentioned in the will of Charles White, and they claimed the premises in question, being No. 3, Tavistock-street, in the borough of Plymouth, as devisees under that will, the material part of which is as follows:—

“I also give, devise, and bequeath to my grand-daughter Ann Elliott Sawday, her heirs, executors, and administrators for ever, all that dwelling-house situated and being in Tavistock-street, No. 3, in the borough of Plymouth, in the occupation of Mr. G. Verrecombe, baker. I also give, devise, and bequeath to my grand-daughter Ann Elliott Sawday all that dwelling-house and garden situate and being behind the above-named dwelling house, No. 3, Tavistock-street, now in the occupation of Mr. John Cornish, extending into Saltash-street. I also give, devise, and bequeath to my grand-daughter Ann Elliott Sawday all that other dwelling-house and garden situate and being in York-street, No. 30, the whole of which premises are in the borough of Plymouth, during her natural life; but should the said Ann Elliott Sawday marry and have children lawfully begotten, then, after her decease, the before-mentioned houses to descend to her children, and to be by them equally divided; but should the said Ann Elliott Sawday die without issue, then the said premises to become the joint property of the children of Charles Bailey, shoemaker,

A testator devised as follows:—

“I give to my grand-daughter S., her heirs, executors, and administrators for ever, that dwelling-house in Tavistock-street, No. 3, in the borough of Plymouth. I also give to S. that dwelling-house and garden situate behind the above-named dwelling-house, and in the occupation of C. I also give to S. that other dwelling-house and garden situate in York-street, No. 30, the whole of which premises are in the borough of Plymouth, during her natural life; but should S. marry and have children, then, after her decease, the before-mentioned houses to descend to her children; but should S. die without issue, then the said premises to become the joint property of the children of B. I also give, provided S. dies without issue, the sum of 100*l.*

to J., to be paid to him out of the before-mentioned premises:”—*Held*, that S. took an estate in fee simple in the first-mentioned house; and therefore, upon her death without issue, the children of B. were entitled only to the two other houses.

1850.
 {
 Don
 d.
 BAILEY
 v.
 SLOGGETT.

Stonehouse, of William Bailey, shoemaker, Plymouth, and of John Bailey, tailor, of Walkhampton, all of the county of Devon, and to be by them equally divided. I also give, devise, and bequeath, provided the said Ann Elliott Sawday dies without issue, the sum of 100*l.*, lawful money of Great Britain, to Nicholas James, of the borough of Plymouth, to be paid to him out of the before-mentioned premises."

It was admitted, that all the premises mentioned in the will were in the borough of Plymouth, and that Ann Elliott Sawday had died without issue; but it was objected, on the part of the defendant, that the plaintiff could not recover, inasmuch as Ann Elliott Sawday took an estate in fee in the premises No. 3, Tavistock-street. The learned Judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly,

Greenwood and *Montague Smith* shewed cause.—The intention of the testator, to be collected from the whole will, is, that, in the event of the death of Ann Elliott Sawday without issue, the children of the Baileys should take all the premises described as "in the borough of Plymouth." The first devise did not create an estate in fee in the premises No. 3, Tavistock-street, for the testator uses the words "heirs, executors, and administrators." Then, in the subsequent part of the will there is a gift to the children of Ann Elliott Sawday, which would create an estate tail, and a limitation over in default of issue; therefore, the two parts of the will being repugnant, the former must be rejected, and the latter stand. The words "the whole of which premises are in the borough of Plymouth," may be read in a parenthesis. The terms "before-mentioned houses" and "the said premises" refer to the whole. [*Parke*, B.—*Primâ facie* they would; but the tes-

tator in the former part of the will has absolutely disposed in fee of the house No. 3, Tavistock-street; and then he goes on to bequeath the other premises for life; that must mean those which remain to be disposed of] The testator's meaning is explained by the last clause of the will, by which the 100*l.* is charged on all "the before-mentioned premises."

1850.
Don
d.
BAILLY
v.
SLOUGHTER.

Crowder, Rowe, and J. H. Palmer appeared in support of the rule, but were not called upon.

PARKER, B.—I am of opinion, that, upon the true construction of this will, the testator first makes an absolute and entire devise of the fee simple in the dwelling-house No. 3, Tavistock-street. He then devises the two other dwelling-houses for life; but, if the tenant for life should marry and have children, "the before-mentioned houses" are to descend to her children; but, in case the tenant for life should die without issue, there is a gift over to the lessors of the plaintiff. That must mean that he devises to them the before-mentioned houses which he has not disposed of before. It is true that the use of the word "but" is not perfectly accurate; we cannot, however, intend that, by using that particular expression, he meant to cut down the fee. With respect to the last clause, I feel no doubt that the 100*l.* is only charged upon that estate which he has given over.

ALDERSON, B.—I am of the same opinion. It is perfectly plain what the testator meant. He first gives one house, which he describes as being in the borough of Plymouth. He then gives another house, which he does not describe as being in the borough of Plymouth; and he then gives a third house, saying, "the whole of which premises are in the borough of Plymouth." Consequently, by thus describing something which he has not described before, he means the two latter houses (for the first has been already described), and those premises so described he devises for

1850.
 DoB
 d.
 BAILEY
 v.
 SLOGGETT.

life, and if the tenant for life marries and has children, they are to be divided amongst the children, but if the tenant for life dies without issue, they are to go to the lessors of the plaintiff, subject to a charge of 100*l*. Such a construction gives full effect to every word in the will.

ROLFE, B., and PLATT, B., concurred.

Rule absolute.

Feb. 12.

SPOTSWOOD *v.* BARROW and Another.

To an action for wrongfully discharging the plaintiff from the defendant's service as a traveller and salesman, the defendants pleaded that the plaintiff refused to obey the lawful and reasonable commands of the defendants with reference to the plaintiff's conduct and proceedings in the said employ, and that the plaintiff received from divers customers of the defendants divers monies which he wrongfully appropriated to his own use; wherefore the defendants did by reason of the premises refuse to continue the plaintiff in their employ, and therefore discharged him. Replication, *de injuriâ*. At the trial, it was proved that the plaintiff had misappropriated the defendants' monies, but the fact of such misappropriation was not known to the defendants until after they had discharged the plaintiff:—*Held*, that, the defendants having justifiable cause for discharging the plaintiff, the learned Judge was wrong in leaving it to the jury to say whether they discharged him for that cause, for that their motive and intention was not in issue under the replication *de injuriâ*.

ASSUMPSIT for the wrongful discharge of the plaintiff from the service of the defendants, as a traveller and salesman, before the expiration of the period of his engagement.

Plea, that whilst the plaintiff continued in such employ, to wit, on &c., and on divers other days and times, &c., he misbehaved and misconducted himself in this, to wit, that he wilfully, wrongfully, and improperly refused to obey the just, lawful, and reasonable commands of the defendants, with reference to the plaintiff's conduct and proceedings in the said employ, and the business thereof; and that the plaintiff, during the time aforesaid, received from divers customers of the defendants divers monies of and for the defendants, and did not nor would account for or remit the said monies to the defendants within reasonable times in that behalf, but then neglected and refused so to do, and improperly and wrongfully, and contrary to the express and lawful and reasonable commands of the defendants in this behalf, kept and detained the said monies from the defendants for long and unreasonable spaces of

time, without any just cause or excuse in that behalf; and also wrongfully and unjustly appropriated a part of the said monies to his own use, without the consent and against the will of the defendants. Wherefore the defendants afterwards, to wit, at the said time in the declaration in that behalf mentioned, did by reason of the said premises in this plea aforesaid, refuse to continue the plaintiff in their said employ, or to suffer or permit the plaintiff to travel or act as a salesman of and for the defendants, or in any other manner in their said employ, as by the plaintiff in the said declaration in that behalf alleged; and the defendants then therefore discharged the plaintiff from their employ, as they the defendants lawfully might for the cause aforesaid.—Verification.

Replication, de injuriâ.

At the trial, before *Wightman*, J., at the Liverpool Summer Assizes, 1849, it appeared that, in March, 1846, the defendants agreed to employ the plaintiff as a traveller and salesman for one year, at a salary of 200*l*. The plaintiff accordingly entered the defendants' service in that capacity, and continued therein until August, 1846, when the defendants discharged him. On the part of the defendants, it was proved that the plaintiff had wrongfully appropriated certain monies which he had received for the defendants' use; but it appeared, on cross-examination, that the fact of the misappropriation did not come to the defendants' knowledge until after they had discharged the plaintiff. The learned Judge asked the jury whether the misconduct proved was the cause of the dismissal; and the jury having replied in the negative, a verdict was found for the plaintiff for 80*l*.

Wilkins, Serjt., in the following term obtained a rule nisi for a new trial, on the ground of misdirection; against which

Knowles now shewed cause.—A master cannot justify

1850.
 SPOTSWOOD
 v.
 BARROW.

1850.
 SPOTSWOOD
 v.
 BARROW.

the discharge of a servant on account of misconduct unknown to him at the time of dismissal. The law is thus stated in *Cussons v. Skinner* (a): "Where there has been disobedience or an act of misconduct by a servant, known to the master at the time he discharges him, although the master does not mention that as the precise ground of discharge, he may afterwards, by shewing that the fact existed, and that he knew it, justify such discharge; but semble, that it is otherwise where the act of misconduct was not known to the master at the time of the discharge, as it could not then be the cause of it." This case is distinguishable from *Ridgway v. The Hungerford Market Company* (b), for there the question was not raised by the pleadings. Here the effect of the replication de injuriâ is to put in issue the virtute cujus, and consequently the direction of the learned Judge was right. In *Lucas v. Nockells* (c), Bayley, J., says, "Where a virtute cujus is a mere inference of law drawn from premises previously stated, I agree it cannot be traversed; but where it is not a legal result, but a pure question of fact, I believe all the authorities are that it may be traversed." Here the virtute cujus involves matter of fact, namely, the motive and knowledge of the defendants. [*Parke, B.—Oakes v. Wood* (d) decided, that the motive and intention with which an authority given by law is exercised cannot be inquired into under the general replication de injuriâ. If this plea had alleged that the defendants had notice of the plaintiff's misconduct, wherefore they discharged him, your argument might apply. *Alderson, B.—*It is clearly settled since that case, that the motive is not in issue.]

Wilkins, Serjt., and *Atherton* appeared to support the rule, but were not called upon.

PARKE, B.—The replication only involved the fact of

(a) 11 M. & W. 161.

(c) 10 Bing. 193.

(b) 3 A. & E. 171.

(d) 2 M. & W. 791.

misconduct; therefore the learned Judge was wrong in leaving to the jury what the motive of the defendants was. *Oakes v. Wood* decided that the defendant's motive or intention is immaterial, if the law justifies him in doing what he has done.

1850.
SPOTSWOOD
v.
BARROW.

ALDERSON, B.—All that is in issue is, whether the defendants had a justifiable cause for doing the act complained of.

ROLFE, B.—The subject may be illustrated by what was said in *Doe d. Daniell v. Woodruffe* (a), viz. "Where a party having a right of entry, enters, it is not competent for him to repudiate any rights he may possess, and to say he has entered as a trespasser, or by some other than his real title. As soon as he has entered he is possessed, whether he will or no, by virtue of every title which he had in him, and which he could assert by entry." Littleton, sect. 695, is there referred to; and that old authority seems to me to be founded on very good sense.

PLATT, B., concurred.

Rule absolute.

(a) 10 M. & W. 608.

1850.

THE NORTH WESTERN RAILWAY COMPANY *v.* M^cMICHAEL
THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION
RAILWAY COMPANY *v.* PILCHER (a).

To an action for calls on railway shares, the defendant pleaded that the Company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register of shareholders as the proprietor thereof, and so the defendant became and still is the original holder of the shares by contract with the Company, and not otherwise; that, when the shares were granted to him, and his name entered as aforesaid, and also at the respective times of making the calls, the defendant was an infant; that he never ratified or confirmed the said application, grant, entry, and proprietorship, but the same have hitherto remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit or advantage whatsoever from the shares or by reason of his being the proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant:—*Held*, on general demurrer, that the plea was bad for want of an averment that the defendant had repudiated the contract, or, at least, that he continued a minor.

Semble, that an infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession and has not disclaimed; at all events, unless he still continues a minor.

THE first of these cases was an action of debt. The first count of the declaration stated, that the defendant is the holder of divers, to wit, ten shares, in the said Company, and is indebted to the plaintiffs in a large sum of money, to wit, 112*l.* 10*s.*, in respect of divers, to wit, six calls on each of the said shares, to wit, a certain call of 1*l.* 10*s.* on each of the said shares, a certain other call, &c. (stating them); whereby an action hath accrued to the plaintiffs by virtue of the "Companies Clauses Consolidation Act, 1845," and the "North Western Railway Act, 1846," to demand from the defendant the said sum.

The second count was for interest, and money due on an account stated.

Plea to the first count.—That, before the making of any of the calls in the declaration mentioned, to wit, on &c., the defendant applied to the Company to become the holder of ten shares in the Company; and the Company then, to wit, on &c., in pursuance of the defendant's application, granted the shares in the declaration mentioned, to him, as the original and first holder thereof, and then entered his name in the register of shareholders in the Company as the proprietor of the said shares; and so the defendant then became and still is the original and

(a) These and the next following case were decided on the 11th of January, 1851, but are published

early on account of their general importance.

first holder of the shares in the declaration mentioned, by contract with the Company, to wit, in manner aforesaid, and not otherwise; and the proprietorship of the said shares, acquired as in this plea aforesaid, is the same proprietorship of the said shares in the declaration mentioned. That, when the defendant applied as aforesaid, and when the shares in the declaration mentioned were granted to him and his name entered as aforesaid, and also at the respective times of the making of the calls in the first count mentioned, the defendant was an infant within the age of twenty-one years, to wit, of the age of twenty years. That the defendant has never ratified or confirmed the said application, grant, entry, and proprietorship, or any or either of them, but the same have, and each and every of them hath hitherto always remained, wholly unratified and unconfirmed. That the defendant has not at any time derived any profit, benefit, or advantage whatsoever from the said shares or by reason of his being proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant.—Verification.

There was a similar plea to the second count.

General demurrer to both pleas, and joinder therein.

Willes, in support of the demurrer (a).—The fact of the defendant being an infant at the time when the shares were allotted to him, and also at the time of making the calls, affords no answer to the action. The plea does not state any refusal or renunciation of the shares. If this is to be treated simply as an action on *a contract* between the Company and the infant, it may be conceded that the plea is good; but if, on the other hand, it is assimilated to the case of a purchase by an infant of an estate in respect of which rent is to be paid, the plea is bad. It is

1850.
NORTH WEST-
ERN RAIL-
WAY Co.
v.
M^CMICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESTER
JUNCTION
RAILWAY Co.
v.
PILCHER.

(a) The case was argued November 20, 1850.

1850.
 NORTH WEST-
 ERN RAIL-
 WAY CO.
 v.
 M'MICHAEL.
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY CO.
 v.
 PILCHER.

submitted that the case must be decided by analogy to the latter. An infant has clearly a capacity to purchase: Co. Litt. 2. b. The 8 & 9 Vict. c. 16, s. 79, also contemplates the case of an infant shareholder. The purchase of shares is an engagement by the infant to take the property purchased, which, by Act of Parliament, is subject to the contingency of the Company calling for payment by instalments, the infant having the option, at any time before action brought, to renounce the benefit and so get rid of the burthen. The legislature has attached to these shares certain incidents, which render them analogous to chattels real; and if an infant takes a lease, though at an extravagant rent, he is bound to pay it unless he renounce, for he has the remedy in his own hands. *Ketsey's case* (a) was an action upon a lease for arrears of rent, to which the defendant pleaded infancy; and "the sole question was, whether a lease made to an infant is void. And it was objected, that it should be void, because it might be prejudicial to him, who had not sufficient discretion for the managing of the land, and the rent may be greater than the value of the land. But the Court held it to be voidable only at his election; for if it were for his benefit, it shall be no ways void; but the infant, at his election, may make it void by refusing and waiving the land before the rent-day comes; for then no action of debt will lie against him. But, in the principal case, it was not shewn that the rent was of greater value, and the defendant was of full age before the rent-day came; therefore it was adjudged for the plaintiff." In the report of the same case, in Brownlow, 120, it is said, "If more rent be reserved than the value of the land, he ought to have set forth, that it might have appeared to the Court, which is not done; for then clearly he should not have been bound, for there had been no profit to the infant, as *Russell's case*

(a) Cro. Jac. 320.

is, 5 Rep. 27." In *Kirton v. Elliott* (a), it was said by *Haughton*, J.—“If a lease be made of an acre of land to an infant, rendering a 100*l.* rent by the year, and he doth occupy and enjoy this, he shall be charged with the rent, he being here to be taken as a purchaser. *Dodderidge*, J.—If a greater rent be reserved than the land is worth, there, peradventure, the infant shall not be charged with it.” Those authorities were recognised by this Court in *The Leeds and Thirsk Railway Company v. Fearnley* (b), where, upon the case of *Williams v. Moor* (c) being cited, *Parke*, B., said—“This is not the ordinary case of a contract by an infant, but a purchase of shares, by which he acquired a property in the possible profits of the concern. Now, according to *Ketsey’s case*, and what is more distinctly laid down by *Dodderidge*, J., in *Kirton v. Elliott*, he would be liable unless he repudiated; then, ought not the plea to aver that fact?” However, if an infant avoids a lease after he becomes of full age, he cannot recover back the premium which he has paid for it during his infancy: *Holmes v. Blogg* (d). In the case of *The Cork and Bandon Railway Company v. Cazenove* (e), the Court of Queen’s Bench considered that there was a statutory liability which bound the infant. In *The Newry and Enniskillen Railway Company v. Coombe* (f), the plea stated that the defendant became a shareholder by contract; that, at the time the calls were made, he was an infant; and that, before action brought, he disaffirmed and repudiated the contract; so that the case came within the principles laid down in *Ketsey’s case* and *Kirton v. Elliott*; and the Court, on the authority of *Stowel v. Lord Zouch* (g), construed the 8 & 9 Vict. c. 16, s. 26, as containing an implied exception in favour of persons by law incompetent to

1850.
NORTH WEST-
ERN RAIL-
WAY Co.
v.
M’MICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
PILCHER.

(a) 2 Bulst. 69.

(b) 4 Exch. 26.

(c) 11 M. & W. 256.

(d) 2 Moore, 552.

(e) 10 Q. B. 935.

(f) 3 Exch. 565.

(g) Plowd. 364.

1850.

NORTH WEST-
ERN RAIL-
WAY CO.
v.
M'MICHAEL
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY CO.
v.
PILCHER.

contract. The only difference between the present case and that of *The Leeds and Thirsk Railway Company v. Fearnley*, where the plea of infancy was held bad, is, that in the latter it was not averred that the defendant became a shareholder by contract with the Company. The Court will not infer that the defendant was an infant at the time the calls became due; and it should have been alleged that the disability continued up to that time. The allegation, that the defendant "has never ratified or confirmed the application," is immaterial, inasmuch as he is liable unless he has repudiated. It is further alleged, that "he has not at any time derived any profit, benefit, or advantage whatsoever from the shares," but non constat that they are not of value in the market. This is not a duty arising from contract, but is founded on the statute, and it makes no difference whether the shares are acquired by purchase or by bequest. It is not like the case of an ordinary partnership, because there the shares are not transferable without the assent of the copartners. [He also referred to the 18th section of the 8 & 9 Vict. c. 16.]

Cleasby, contra. — Enough is stated in this plea to render the defence of infancy available. It is shewn that the defendant became a shareholder by *contract*, and it is unnecessary to add that he repudiated. *The Newry and Enniskillen Railway Company v. Coombe* only decided that a plea containing both allegations was good. [*Alderson*, B.—This Court has held that the property of these Companies is *money*, which, in order to make it profitable, is intrusted to the corporation, who have an unlimited power of converting part of it into land, part into goods, and of changing and disposing of each from time to time, for the purpose of obtaining a surplus profit for the individual contributors: *Bligh v. Brent* (a).] The purchaser gets no

tangible property, only a right: *Humble v. Mitchell* (a). Upon these pleadings, it must be taken that the defendant continued a minor, because the defence set up is infancy at the time the contract was entered into; and if, in order to get rid of that *prima facie* defence, it is necessary to shew a different status, that should come by way of replication, and then the defendant would have an opportunity of rejoining that he had repudiated the contract. In *Kirton v. Elliott*, the Court assumed that the defendant was of full age; but how that was warranted does not appear. An infant is not supposed, *à priori*, when he becomes of age, to know what obligations he has entered into. In *Bac. Abr. "Infancy and Age,"* (G), it is said, "The rights of infants are much favoured in law, and regularly their laches shall not be prejudicial to them, upon a presumption that they understand not their right, and that they are not capable of taking notice of the rules of law, so as to be able to apply them to their advantage." A minor need not repudiate during infancy, and when he is of age, he may not know whether he ought to repudiate or not. If there is no semblance of benefit from the contract, it cannot be enforced, as in the case of a lease by an infant rendering no rent: *Bac. Abr. "Infancy and Age,"* (I) 7. In *The Cork and Bandon Railway Company v. Cazenove*, the continued possession or non-repudiation of the shares was considered equivalent to a ratification at full age. Here there is an express averment that the defendant has never ratified; so that, even if he could be taken to ratify by not repudiating, that does not apply here. Then how can he be liable, when he has done no act? This is not like the purchase of land, in which case the continuing in possession after full age is a tacit confirmation of the purchase, since it is to turn to his advantage: *Bac. Abr. "Infancy and Age,"* (I) 8.

1850.
NORTH WEST-
ERN RAIL-
WAY Co.
v.
M'MICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
PILCHER.

(a) 11 A. & E. 205.

1850.
 NORTH WEST-
 ERN RAIL-
 WAY Co.
 v.
 M'MICHAEL.
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY Co.
 v.
 PILCHER.

Ketsey's case is there explained, and it is said, "If an infant takes a lease for years of land rendering rent, which is in arrear for several years, then the infant comes of age, and still continues the occupation of the land; this makes the lease good and unavoidable, and by consequence makes him chargeable with all the arrears incurred during his minority; for though at full age he might have departed from his bargain, and thereby have avoided payment of the arrears, which the lessor suffered to incur during his minority; yet his continuance in possession after his full age ratifies and affirms the contract ab initio, and so gives remedy for the arrears of rent incurred from the time of the contract made." Here it is sought to make the omission to repudiate equivalent to a ratification. The proper mode of avoiding a contract by an infant, is by pleading the special matter: Bac. Abr. "Infancy and Age," (I) 7; *Gibbs v. Merrill* (a). In *Williams v. Moor* (b), Parke, B., in delivering the judgment of the Court, says, "The contract of an infant for goods sold and delivered (not being necessities), is as completely void as his contract on an account stated, if by the word *void* is meant incapable of being enforced." Then how can his omission to do any act be regarded as a ratification? *Ketsey's case*, in Cro. Jac., is evidently the same as that reported in Brownlow as *Kelsey's case*, and in Bulstrode as *Kirton v. Elliott*; and while in the former report, the case seems to have been decided on the ground that the infant continued in possession of the land after he was of full age, from the latter it would seem that simple possession was considered enough to render him liable. The same case is thus stated in Roll. Abr. "Enfants," (K): "If a lease for years be made to an infant, rendering rent, the rent is in arrear, and then the infant comes of full age, and afterwards continues the occupation of the land; this shall make him

(a) 3 Taunt. 307.

(b) 11 M. & W. 256.

chargeable with the arrears incurred during his infancy." [Parke, B.—In *Maddon v. White* (a), Buller, J., said, that "Lord Mansfield, in the case of *Drury v. Drury* (b), laid it down as a general principle, that if an agreement be for the benefit of an infant at the time, it shall bind him; Lord Hardwicke afterwards adopted this rule."] That case is found in Wilmot's Notes of Opinions and Judgments, p. 181; and where land vests in an infant, the maxim, "transit terra cum onere" applies. This case differs from an action of debt for rent, for that is not founded entirely on contract, but also on actual occupation.

1850.
NORTH WEST-
ERN RAIL-
WAY CO.
v.
M'MICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY CO.
v.
PILCHER.

Willes, in reply, cited *Tounson v. Tickell* (c).

Cur. adv. vult.

(a) 2 T. R. 159.

3 Bro. P. C. 492.

(b) Dom. Proc. 26th May, 1762;

(c) 3 B. & Ald. 31.

THE case of *The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Pilcher*, was also an action of debt for calls. The declaration stated, that the defendant was and still is the holder of divers, to wit, 180 shares in the said Company, and being such holder, was and still is indebted to the said Company in a large sum of money, to wit, 300*l.*, in respect of a call made on the said shares; whereby &c., an action hath accrued to the plaintiffs, by virtue of the Companies Clauses Consolidation Act, 8451,

Where nothing but the simple fact of infancy is pleaded to an action for railway calls against a purchaser who has been registered, and thereby become a shareholder in a permanent character, the interest continuing to be vested in the infant,

and the subsequent obligation to pay, such a plea is insufficient. Therefore, where, to a declaration for railway calls, the defendant pleaded, that, at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call upon the defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years: to which the plaintiffs replied, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years; upon which issue was joined, and a verdict entered for the defendant:—*Held*, that the plaintiffs were entitled to judgment non obstante veredicto.

1850.
 NORTH WEST-
 ERN RAIL-
 WAY Co.
 v.
 M'MICHAEL.
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY Co.
 v.
 PILCHER.

and the Birkenhead, Lancashire, and Cheshire Railway Act, 1846, to demand from the defendant the said sum, &c.

Plea, that, at the time when he the defendant first became and was the holder of the said shares, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the debts, causes of action, and liabilities, and each and every of them in the said declaration mentioned, have accrued to the plaintiffs and been incurred by the defendant, as in the said declaration is alleged, and at the time of the making and entering into by him the defendant of the contracts by the force, virtue, and in pursuance of which the plaintiffs claim to be entitled by law to make the said call upon the defendant, and to demand and have the amount of the same of and from the defendant, in manner and form as in the said declaration is alleged, he the defendant was an infant, within the age of twenty-one years.—Verification.

Replication, that the defendant, at the time when he first became and was the holder of the said shares in the said declaration mentioned, and at the time of the making and entering into by him the defendant of the said contracts, and every of them in the said plea mentioned, was of the full age of twenty-one years, and not within the age of twenty-one years, to wit, of the age of nineteen years. Conclusion to the country and issue thereon.

A verdict having been entered for the defendant on this issue, pursuant to leave reserved at the trial (a),

Welsby obtained a rule nisi for judgment non obstante veredicto, on the ground that the plea was bad; against which

Willes appeared to shew cause (Dec. 3, 1850), and *Welsby* to support the rule. They relied upon the arguments urged in the preceding case.

Cur. adv. vult.

(a) See the case, ante, p. 24.

The judgment of the Court in both the above cases was, on the 11th of January, 1851, delivered by

1850.
NORTH WEST-
ERN RAIL-
WAY Co.
v.
M'MICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESTER
JUNCTION
RAILWAY Co.
v.
PILCHER.

PARKE, B.—The question to be decided in the case of *The North Western Railway Company v. M'Michael* is, whether the first plea (the second to the second count being identical) contains a good *prima facie* answer to the declaration. If the effect of a person actually becoming a shareholder in a Railway Company, by original agreement with the Company, ought to be treated as a mere contract with those to whom the proposal was made, for a future partnership with the persons who should be afterwards fixed upon by them, and to contribute to the capital for carrying on the undertakings in a certain proportion, such a contract could not be presumably beneficial to an infant, and would be, as all mere contracts, except for necessities, are, not binding on the infant at all; and the simple fact, that the defendant at the time he made the contract was an infant, would be an answer to an action upon it. The same may be said of an executed contract for the purchase of a mere personal chattel. But in the cases already decided upon this subject, infants, having become shareholders in Railway Companies, have been held liable to pay calls made whilst they were infants (a). They have been treated, therefore, as persons in a different situation from mere contractors, for then they would have been exempt; but, in truth, they are purchasers who have acquired an interest, not in a mere chattel, but in a subject of a permanent nature, either by contract with the Company, or purchase or devolution from those who have contracted, and with certain obligations attached to it, which they were bound to discharge, and have been thereby placed in a situation analogous to an infant purchaser of real estate, who has

(a) *The Cork and Bandon Railway Company v. Fearnley*, 4 Exch. 26.
way Company v. Cazenove, 10 Q. B. 935; *The Leeds and Thirsk Rail-*

1850.
 NORTH WEST-
 ERN RAIL-
 WAY Co.
 v.
 M'MICHAEL.
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY Co.
 v.
 PILCHER.

taken possession, and thereby becomes liable to all the obligations attached to the estate, for instance, to pay rent^(a) in the case of a lease rendering rent, and to pay a fine due on the admission, in the case of a copyhold to which an infant has been admitted^(b), unless they have elected to waive or disagree to the purchase altogether, either during infancy or after full age, at either of which times it is competent for an infant to do so: *Bac. Abr.* "Infancy and Age," (I) 5; *Co. Litt.* 380. This Court accordingly held, in *The Newry and Enniskillen Railway Company v. Coombe*^(c), that an infant who did avoid the contract of purchase during minority, was not liable to pay any calls. In the subsequent case of *The Leeds and Thirsk Railway Company v. Fearnley*^(d), where there had been no waiver or repudiation of the purchase, we held, in conformity with the decision of the Queen's Bench, that the defendant continued liable. We cannot say that we concur in the opinion of that Court, as reported in 11 Jur. 802, and 10 Q. B. 935, if it goes to the full extent that *all* shareholders, including infants, are by the operation of the Railway Acts made absolutely liable to pay calls. No doubt the statute not only gave a more easy remedy against the holder of shares by original contract with the Company, for calls, and also attached the liability to pay calls to the shares, so as to bind all subsequent holders; but we consider, as we have before said, that there are implied exceptions in favour of infants and lunatics in statutes containing general words, (*Stowell v. Lord Zouch*^(e)), though that depends, of course, on the intent of the legislature in each case, (see *Wilmot's Notes of Opinions and Judgments*, p. 194, *The Earl of Buckinghamshire v. Drury*), and that this statute did not mean, by general words, to deprive infants of the protection which the law gave them, against improvi-

(a) 21 Hen. 6, 31 B.

(c) 3 Exch. 565.

(b) *Evelyn v. Chichester*, 3 Burr.
1717.

(d) 4 Id. 26.

(e) Plowd. 364.

dent bargains. Under this statute, therefore, our opinion is, that an infant is not absolutely bound, but is in the same situation as an infant acquiring real estate, or any other permanent interest: he is not deprived of the right which the law gives every infant, of waiving and disagreeing to a purchase which he has made; and if he waives it, the estate acquired by the purchase is at an end, and with it his liability to pay calls, though the avoidance may not have taken place till the call was due. (See *Bac. Abr. "Infancy and Age,"* (I) 8. The law is clearly laid down in *Co. Litt. 2. b.*: "An infant or minor hath, without consent of any other, capacity to purchase, for it is intended for his benefit; and, at his full age, he may either agree thereunto and perfect it, or, without any cause to be alleged, waive or disagree to the purchase; and so may his heirs after him, if he agreed not thereunto after his full age." A shareholder, indeed, in a railway Company, or other chartered corporation, is not thereby made a holder of real estate: *Bligh v. Brent* (a); for all real estates are vested in the corporate body, not in the individuals composing it; but the shareholder acquires, on being registered, a vested interest of a permanent character, in all the profits arising from the land, and other effects of the Company, and, when registered, may be deemed a purchaser in possession of such interest, and is placed in a position analogous to that of a purchaser in possession of real estate.

When, therefore, there is nothing but the simple fact of infancy pleaded to an action for calls against a purchaser who has been registered, and thereby become a shareholder in a subject of a permanent character, the interest continuing to be vested in the infant, and the consequent obligation to pay, the simple plea of infancy is, according to the above authorities, insufficient; and on that ground we

1850.
NORTH WEST-
ERN RAIL-
WAY CO.
v.
M'MICHAEL,
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY CO.
v.
PILCHER.

(a) 2 Y. & C. 268.

1850.
 NORTH WEST-
 ERN RAIL-
 WAY CO.
 v.
 M'MICHAEL.
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESTER
 JUNCTION
 RAILWAY CO.
 v.
 PILCHER.

think the plea in the case of *The Birkenhead Railway Company v. Pilcher*, which we have to consider with this, bad, notwithstanding the verdict, and therefore are of opinion that the rule should be absolute to enter up judgment for the plaintiffs in that case, notwithstanding the verdict entered for the defendant.

But the case of *The North Western Railway Company v. M'Michael* contains, besides the averment of infancy at the time of the contracts for the shares, other special facts,—not a waiver by the infant, but averments that he had derived no advantage from the shares, and had never ratified or confirmed the purchase. This case is one of more difficulty.

The law upon this subject is to be found as early as 21 Hen. 6, 31 B, where it was held by *Newton, J.*, that, if an infant lessee takes possession, he is bound to pay the rent; and in conformity with that ruling was the decision in a case reported in Brownlow, 120, as *Ketley's case*; Cro. Jac. 320, as *Kelsey's case*; 2 Bulst. 69, as *Kirton v. Elliott*; and in Roll. Abr. 731, as *Kettle v. Eliot*. The case is most fully reported in Brownlow. It was an action of debt for rent; the defendant pleaded his infancy at the time of the lease made, in bar; and it was argued, on demurrer to the plea, that the defendant should be charged, because by the lease made he is become a purchaser, and so to be, in judgment of law, as a man of full age.

We collect that the principle upon which the Court decided was, that, every purchase being presumably for the benefit of the infant, his purchase vested the estate in him on entry and taking possession, and rendered him liable to the obligations attached to it, until he disagreed to the estate, and thereby caused the conveyance to be inoperative, and avoided the obligation to pay rent. In referring to this case, the passage in Bac. Abr. "Infancy," (1) 8, treats the infant as being bound by reason of acquiescence after full age. How that could be collected from the reports of the case is not clear; and so Lord *Ellenborough*,

in *Baylis v. Dineley* (a), intimates an opinion that a lease is equivocal, whether for the benefit of the infant or not, and that, if he continues a possessor after age, he adopts it; and this was a part of the argument for the defendant at the bar. But it seems to us to be the sounder principle, that, as the estate vests, as it certainly does, the burthen upon it must continue to be obligatory until a waiver or disagreement by the infant takes place, which, if made after full age, avoids the estate altogether, and reverts it in the party from whom the infant purchased; if made within age, suspends it only, because such disagreement may be again recalled when the infant attains his majority.

But then arises a question of difficulty, whether the fact that this particular purchase was a disadvantageous one, is an answer, the estate still being vested in the infant. We are disposed to think that the plea does not sufficiently state that the contract was a losing one, or that the shares were not worth what the defendant agreed to pay, which they well might be, though the defendant himself had actually made no profit by them; but supposing the averment to be sufficient in that respect, we still think the plea bad.

This question appears to have been discussed in the case of *Ketley*, as reported in Bulstrode, *Haughton*, J., expressing an opinion, that if the lease was for an acre at 100*l.* per annum, and the infant occupy and enjoy it, he is to be charged with the rent, he being here taken to be a purchaser; but *Dodderidge* said, that if a greater rent was reserved than the land was worth, that then, *peradventure*, the infant should not be charged. This opinion is more strongly expressed in the report in *Brownlow*. This is certainly a point of some nicety; but the question may be asked, why, in such a case, does not the infant disagree to and avoid the purchase, and so get rid of the obliga-

1850.
 NORTH WEST-
 ERN RAIL-
 WAY Co.
 v.
 M^cMICHAEL
 BIRKENHEAD,
 LANCASHIRE,
 AND CHESHIRE
 JUNCTION
 RAILWAY Co.
 v.
 PILCHER.

(a) 3 M. & S. 481.

1850.

NORTH WEST-
ERN RAIL-
WAY Co.

v.

M'MICHAEL.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
PILCHER.

tion? and is it reasonable, that he should retain the estate and prevent the owner from having any use of it, and not be liable to the burthen, though disproportionate? It may be answered, that whilst he is an infant he is incompetent to decide whether he ought to waive the purchase or not, and in the meantime, he ought to be at liberty, or his guardian for him, to get rid of the liability, by shewing that it was a prejudicial contract. But if so, such a plea would not be good if the infant had attained his majority, for then, clearly, he ought to disclaim it, and thereby give back the estate; and to make such a plea good, where there is no disclaimer averred, it ought to appear that the infant is not yet of age. The plea, as it stands, is by no means free from doubt. We think, however, the more reasonable view of the case is, that the infant, even in the case of a lease which is disadvantageous to him, cannot protect himself if he has taken possession, and has not disclaimed,—at all events, unless he still be a minor. We think that the defendant is in a situation analogous to that, unless he disclaims the interest, and so avoids the transaction altogether. He cannot keep the interest, and prevent the Company from having it, and dealing with it as their own, without being liable to bear the burden attached to it. For these reasons we think the plea is bad, and there must be judgment for the plaintiffs.

Judgment for the plaintiffs.

1850.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY v. BURNSIDE.

DEBT for railway calls.—The declaration stated, that the defendant is the holder of twenty shares in the South Staffordshire Railway Company, and is indebted to the said Company in 118*l.*, that is to say, in 28*l.* for and in respect of a call of 1*l.* 8*s.* upon each of the said shares, heretofore, to wit, on the 9th of September, 1847, duly made by the said Company, and in the further sum of 30*l.*, for and in respect of another call of 1*l.* 10*s.*, &c., (stating other calls); whereby an action hath accrued to the plaintiffs, to demand and have of and from the defendant the said sum of 118*l.* above demanded, by virtue of the Companies Clauses Consolidation Act, 1845, and of the South Staffordshire Junction Railway Act, 1846, and of the South Staffordshire Railway Act, 1847.

Pleas.—First, never indebted; secondly, that the defendant is not the holder of the said shares in the said Company, or of any or either of them, *modo et formâ*; thirdly, that before the commencement of the suit, to wit, on &c., the defendant became a bankrupt, within the true intent and meaning of the statutes in force concerning bankrupts, and that the said supposed causes of action in the declaration mentioned, and each of them, accrued to the plaintiffs before the defendant so became a bankrupt; concluding to the country.—Upon which pleas issues were joined.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1850, it appeared that the action was brought by the South Staffordshire Railway Company, to recover the

The defendant, a railway shareholder, became bankrupt on the 8th of February, 1848. On the 18th of the same month a call was made, and three other calls were subsequently made. On the 24th of April, 1848, the defendant obtained his certificate. The scrip was handed over to the assignees, and some correspondence took place between the trade assignees and the official assignee, in the course of which the former sent the latter a statement of the bankrupt's property, comprising in it the probable value of the shares in question, and containing in it an estimate of the amount forthcoming to work the fiat and pay dividends. The trade assignee subsequently wrote to the official assignee, suggesting the propriety of

selling the shares. The shares, however, continued in the possession of the assignees:—*Held*, first, that there was no evidence of an acceptance of the shares by the assignees.

* Secondly, that, the property in the shares continuing in the bankrupt, the claim was not barred by his certificate, inasmuch as it was not proveable as a debt due in futuro under the 51st section of the 6 Geo. 4, c. 16, or as a debt due on a contingency, within the meaning of the 56th section of that Act.

1850.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY CO.
 v.
 BURNSIDE.

sum of 118*l.*, being the amount of five calls upon twenty shares of 20*l.* each, of which the defendant was the registered shareholder. The first call, of 1*l.* 8*s.* per share, was made on the 9th of September, 1847, payable the 1st of November following. The second call, of 1*l.* 10*s.* per share, was made on the 18th of February, 1848, payable the 31st of March following. The third call, of 1*l.* per share, was made on the 14th of August, 1848, payable the 14th of September following. The fourth call, of 1*l.* per share, was made on the 29th of November, 1848, payable on the 12th of January, 1849. The fifth call, of 1*l.* per share, was made on the 9th of April, 1849, payable the 12th of July following. A fiat in bankruptcy issued against the defendant on the 8th of February, 1848, and on the same day the official assignee was appointed; on the 26th of February the trade assignee was appointed, and on the 24th of April following the defendant obtained his certificate. On the defendant becoming bankrupt, he duly scheduled the shares, and the amount of subscriptions unpaid, and the scrip certificates were handed over to the assignees, who have ever since continued to hold them. The Company having applied to the defendant for the calls, he gave them notice of his bankruptcy and certificate. Some correspondence took place between the trade assignee and the official assignee, in the course of which the former sent to the latter a statement of the bankrupt's property, in which these shares were entered thus:—"Railway Shares, probably 20*l.*;" and in which statement was the following estimate:—"Balance to work bankruptcy and pay dividend, 86*l.* 17*s.* 6*d.*" On the 6th of June, 1848, the trade assignee wrote to the official assignee a letter containing the following passage:—"In the balance sheet I see a few railway shares—are they sold? if not, had not we best turn them into money, and endeavour to wind up this miserable affair." On the 6th of July, 1848, the trade assignee again wrote to the official assignee a letter

containing the following passage:—"Some few railway shares, which I think he valued at 70*l.*, will belong to the estate—are they sold?—probably they will prove valueless." It was objected, on behalf of the defendant, first, that the shares had passed to the assignees; and secondly, that the calls were a debt proveable under the 6 Geo. 4, c. 16, and consequently barred by the certificate. The learned Judge left it to the jury to say whether the facts amounted to an acceptance of the shares by the assignees; and the jury having found in the negative, his Lordship directed a verdict for the plaintiffs, reserving leave for the defendant to enter a verdict for him, if the Court should be of opinion that, under the circumstances, the plaintiffs were not entitled to recover.

A rule nisi having been obtained accordingly,

Crompton shewed cause (June 17, 1850).—First, the defendant remained the holder of the shares, notwithstanding his bankruptcy and certificate. Property of this description does not vest in the assignees until they have done some act signifying their acceptance of it. *Sayles v. Blane* (a) shews that the transferor of shares remains liable until the transfer is registered. That was an action to recover the amount of certain calls, which the plaintiff had been compelled to pay after he had sold his shares to the defendant; and *Coleridge, J.*, in delivering the judgment of the Court, says, "The statute plainly continues the liability of the plaintiff, and gives him the interest in and profits of the concern until the transfer is registered, treating the defendant as an entire stranger to the Company; and the payment of the calls by the plaintiff did not in any way alter his the defendant's position." *The Midland Great Western Railway Company v. Gordon* (b) is an authority to the same effect. There *Parke, B.*, says,

1850.
SOUTH STAFF-
ORDSHIRE
RAILWAY CO.
v.
BURNSIDE.

(a) 19 L. J., Q. B., 19.

(b) 16 M. & W. 804.

1850.

SOUTH STAFF-
FORDSHIRE
RAILWAY CO.
v.
BURNSIDE.

"All that the purchaser took by the sale to him of the scrip certificates for shares, was an equitable right to have his name entered on the register as a shareholder. If he so registers his name, then he is the shareholder, and the liability of the original shareholder ceases; but, till he does so, it continues." That is equally applicable to the case of bankruptcy, which operates as a transfer by act of law; but so long as the bankrupt's name continues on the register, he remains liable for the calls. The 8 & 9 Vict. c. 16, s. 14, requires the transfer of shares to be by deed. The 15th section, which requires transfers to be registered, is in strict analogy with the 18th section, which relates to the transmission of shares by death or bankruptcy, &c., and requires such transmission to be authenticated by a declaration, and declares, that "until such transmission has been so authenticated, no person claiming by virtue of any such transmission shall be entitled to receive any share of the profits of the undertaking, nor to vote in respect of any such share as the holder thereof." Therefore, it is only by destroying the privity of estate that the bankrupt ceases to be liable for the calls. In general, nothing passes to a bankrupt's assignees but that which is beneficial; and if shares are to be treated as analogous to leases, it is clear that the assignees are not bound to accept the burthen of them. *Copeland v. Stephens* (a) decided, that the general assignment of a bankrupt's personal estate does not vest a term of years in the assignees, unless they do some act to manifest their assent to the assignment; and therefore, until some such act is done by them, the term still remains in the bankrupt, and he is liable to the payment of rent accruing due subsequent to the bankruptcy. The principle is not that the property immediately passes to the assignees, defeasible upon their actual refusal, or their neglect or refusal to do some act manifesting their acceptance

(a) 1 B. & Ald. 593.

of it, but that it remains suspended in the bankrupt until their acceptance: *Henley's Bankrupt Law*, 237. *Boorman v. Nash* (a), and *Herbert v. Sayer* (b), are also authorities to shew that the bankrupt remains liable, unless the assignees have interfered. Here there was no evidence of an acceptance of the shares by the assignees; all that they did was with the view of disposing of them to the best advantage. In *Turner v. Richardson* (c), the assignees advertised for sale by auction, the lease of certain premises of which the bankrupt was lessee (without stating themselves to be the owners or possessed thereof), and, no bidding offering, they never took possession in fact of the premises; and it was held, that this was no more than an experiment to ascertain whether the lease was beneficial or not to the creditors, and did not amount to an assent on the part of the assignees to take the term.

Secondly, the bankruptcy and certificate is no bar to the future calls, for they were not debts which could have been proved under the fiat. There was no means of ascertaining the amount to be proved, or indeed of knowing whether any calls would be made or not. Where a policy of assurance was assigned as a security for a debt, and the debtor covenanted to pay the premiums, it was held that his bankruptcy did not discharge him from liability in respect of such a breach of covenant: *Toppin v. Field* (d). So, where an execution creditor agreed to discharge his debtor out of custody, on his executing a warrant of attorney for payment of the debt by instalments, and in consideration of the discharge, C. undertook that the debtor should pay the debt, with interest, by instalments, it was held that C.'s bankruptcy and certificate were no bar to an action against him for an instalment accruing due after the fiat: *Lane v. Burghart* (e).

(a) 9 B. & C. 145.

(b) 5 Q. B. 965.

(c) 7 East, 335.

(d) 4 Q. B. 386.

(e) 3 M. & G. 597.

1850.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY CO.
 v.
 BURNSIDE.

Martin and J. Addison in support of the rule.—The certificate is a bar to the calls made after the fiat issued. Shares in a Railway Company, not fully paid up, constitute a debt payable on a contingency, within the meaning of the 56th section of the 6 Geo. 4, c. 16 (a). The nature of the liability of a railway shareholder is an engagement by him to pay a certain fixed and ascertained amount to the undertaking if called upon. The covenant to pay calls creates a debitum in præsentì solvendum in futuro; and the legislature has converted that which was originally a contract by deed into a statutory liability. The effect of a certificate in bankruptcy is not to extinguish the debt, but only to bar the remedy: *Newton v. Scott* (b). The shares exist, and, in one sense, the liability exists; but the bankruptcy and certificate prevent the Company from proceeding by action: they may, nevertheless, declare the shares forfeited. [*Rolfe*, B.—Who would be the shareholder at the time of the forfeiture?] It is enough to say, that the bankrupt may be, subject to the right of the assignees to interfere. The 14th to the 18th sections of the 8 & 9 Vict. c. 16, refer to voluntary transfers of shares, and their effect is to render shares an assignable property, though, in order to relieve the vendor from the liability for calls, the trans-

(a) Enacts, "That if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person to whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are hereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to re-

ceive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then such person may, after such contingency shall have happened, prove in respect of such debt and receive dividend with the other creditors, not disturbing any former dividends: provided such person had not, when such debt was contracted, notice of any act of bankruptcy by such bankrupt committed."

(b) 10 M. & W. 471.

fer must be registered. So, under the 18th section, the transmission of shares by bankruptcy, &c., must be authenticated, but there is nothing in that clause to prevent the property in the shares from passing to the assignees, though they cannot exercise the rights of shareholders until the requisite formalities are complied with. The object of those provisions was to facilitate the evidence of property. These shares are not analogous to the case of a lease, but are property of which the assignees become the owners. Under the 1 & 2 Will. 4, c. 56, s. 25, all the bankrupt's personal estate and effects, present and future, vest in his assignees. [*Parke, B.*—A damnosa hæreditas does not pass to the assignees without their assent.] Then there is evidence of an assent. The assignees have taken possession of the scrip certificates, which are the indicia of the property, and have retained them up to the present time. Besides, the letters from the trade assignee to the official assignee shew that they treated them as available property. [*Parke, B.*—The 8 & 9 Vict. c. 16, s. 18, points out the way by which the assignees might become the holders of the shares, and they have not complied with it. So that here there are two equivocal acts, and the absence of a third, which would have been unequivocal, and would certainly have authenticated the transmission if the assignees intended to take the shares.] *Boorman v. Nash* (a), and *Toppin v. Field* (b), were cases of unliquidated damage; *Herbert v. Sayer* (c) merely decided that an uncertificated bankrupt may acquire property, unless his assignees interfere. This is as much a debt payable on a contingency as a guarantee for a sum certain, which has been held to be proveable before it is due, under the 6 Geo. 4, c. 16, s. 56: *In re Willis* (d). At all events, this is a debt in futuro, and therefore proveable under the 51st section of that Act (e).

(a) 9 B. & C. 145.

(b) 4 Q. B. 386.

(c) 5 Id. 965.

(d) 4 Exch. 530.

(e) Which enacts, "That any person who shall have given cre-

1850.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY Co.
 v.
 BURNSIDE.

PARKE, B.—With respect to one part of the case, we are all of opinion that the assignees have not accepted the shares. On the other point we will take time to consider.

ALDERSON, B.—It is clear that the assignees are not liable; the only question is, whether the bankrupt is.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was argued before us at the sittings after Trinity Term, on shewing cause against a rule to enter a verdict for the defendant. An action was brought by a Railway Company for calls. There were pleas of, first, never indebted; secondly, that the defendant was not holder of the shares; and, thirdly, his bankruptcy.

The defendant was the holder of twenty shares of 20*l.* each. There were four calls made; after the first the defendant became bankrupt, and a fiat issued on the 8th of February, 1848. On the 24th of April, 1848, the defendant obtained his certificate; assignees were appointed, and a correspondence took place between the official assignee and the trade assignee, in the course of which the latter sent to the former a statement of the bankrupt's property, comprising in it the value of the shares upon which the

dit to the bankrupt, upon valuable consideration, for any money or other matter or thing whatsoever which shall not have become payable when such bankrupt committed an act of bankruptcy, and whether such credit shall have been given upon any bill, bond, note, or other negotiable security or not, shall be entitled to prove such debt, bill, bond, note, or other security, as if the same was

payable presently, and receive dividends equally with the other creditors, deducting only thereout a rebate of interest for what he shall so receive, at the rate of five per centum, to be computed from the declaration of a dividend to the time such debt would have become payable according to the terms upon which it was contracted."

calls were made, and resulting in an estimate of the probable amount that would be forthcoming to work the fiat and pay dividends, and he subsequently wrote, suggesting the propriety of selling the shares. Three calls were made subsequently to the fiat.

On the trial, before Lord *Cranworth*, a verdict passed for the plaintiff, and liberty was given to move to enter it for the defendant.

As to the first call there is no question—the plaintiffs are not entitled to recover. As to the others, it was contended for the defendant, first, that there was evidence that the assignees had taken to the shares, and consequently that the shares had vested in them, by the assignment before the three last calls were made; and if so, the bankrupt would be no longer holder, and therefore not liable. We intimated our opinion during the argument, that there was no sufficient evidence to warrant the jury in coming to that conclusion, and of that opinion we remain.

The property of the shares, therefore, continuing in the bankrupt, the next question is, whether the Company are barred by his certificate, on the ground that this was a debt proveable under the fiat as a debt due in futuro, under the 51st section, or on a contingency, within the meaning of the 56th section of the 6 Geo. 4, c. 16.

That it was not a debt in *præsenti* payable in futuro, we consider to be quite clear.

The statute which enables the Company to recover calls, no doubt merely enforces an obligation on the shareholders, created by contract. If the defendant contracted with the Company to take twenty shares, upon each of which the capital to be contributed was 20*l.*, he may be said to have agreed with them to pay 20*l.* per share by such instalments as, according to the statute, they were entitled to require. If he purchased the shares from another, he may be considered as having taken upon himself the con-

1850.
SOUTH STAFFORDSHIRE
RAILWAY Co.
v.
BURNSIDE.

1850.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY CO.
 v.
 BURNSIDE.

tract of the vendor to the like effect. But under this section (the 51st), which is taken from the 7 Geo. 1, c. 31, s. 1, a debt under such a contract could not be proved. It was uncertain how much of the 20*l*. per share the exigencies of the Company would call for, nor could it be told what the time of payment would be, and consequently what the amount to be rebated. The clause of the stat. 7 Geo. 1 applies only to certain debts owing at the time of the bankruptcy, payable at a *certain* time: Lord Eldon, in *Ex parte Barker* (a), in effect overruling *Ex parte Mitford* (b). It is clear, therefore, that this debt could not have been proved under the 51st section.

Is this, then, a debt payable on a *contingency*, under the 56th section? The contract on which the shareholder's obligation is founded, is not to pay a certain fixed sum upon a future contingency, but such sum or sums as may be required from himself and all the other shareholders from time to time, not exceeding a certain sum, and regulated by the wants of the Company. At the time of the bankruptcy it was uncertain what the sum would be which the defendant would be called on to pay, and no certain debt was then contracted.

But, in order to bring a case within the 56th section, the bankrupt must have contracted a certain *debt* before the bankruptcy, payable after it on a contingency. The clause was meant to meet cases which were considered as operating very harshly, and which the 51st section did not comprise, such as sums payable under marriage settlements by a bankrupt, after his death, or on survivorship (see 1 Mont. & A. 128, *Ex parte Marshall*).

If it were also necessary that the contingency should be such as to be capable of valuation (as was held by Lord Lyndhurst, see 1 Mont. & A. 124, *Ex parte Marshall*), this is a contingency which never could be the

(a) 9 Ves. jun. 114.

(b) 1 Bro. C. C. 398.

subject of valuation, depending not merely on the wants of the Company, but the ownership of the shares at the time of the call by the bankrupt; for if he had parted with the shares, he would be no longer responsible. However, it does not seem to be necessary that it should be capable of valuation, (*Ex parte Marshall*, Id. 156, and *In re Willis* (a)); therefore we do not decide that the case does not fall within the 56th section on that ground; but on the other ground, of the uncertainty of the claim, we are of opinion that it does not. The situation of the bankrupt in this respect bears a close resemblance to that of a lessee who has become bankrupt, who continues liable after his certificate, to the payment of rent accruing due subsequently to the bankruptcy. The contract to pay rent in futuro, is not a debt contracted at the time of the bankruptcy, and could not be proved under the fiat against him.

We may add, that, to make the bankrupt's estate pay a dividend, on the full amount of the sum subscribed for, when no other shareholders were yet required, nor sure to be required, to pay a call, would put him in a much worse situation than others, and would be obviously unjust.

We think the rule must be discharged.

Rule discharged.

(a) 4 Exch. 530.

1850.
SOUTH STAFF-
FORDSHIRE
RAILWAY Co.
v.
BURNSIDE.

1850.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

Feb. 8.

M'CLURE v. RIPLEY.

A declaration in assumpsit on a special contract, by which the defendant agreed to take a certain portion of a ship's cargo on her arrival at B., after an avowment of readiness and willingness on the part of the plaintiff to deliver the cargo at and after the ship's arrival at B., alleged as a breach, that the defendant, before the arrival of the ship at B., dis-

THIS was a writ of error brought by the defendant below, upon the judgment of the Court of Exchequer (*a*).

It was an action of assumpsit. The declaration contained a special count. To this declaration the defendant pleaded six pleas, on each of which issues were joined. The first four and last issues were found for the plaintiff, the fifth for the defendant. The judgment roll set forth the finding of the jury and the judgment in the following terms:—

“And the jurors now here appearing, to speak the truth of the premises within contained, being elected, tried, and sworn, on their oath say, as to the issue first within joined, that the defendant did promise in manner and form as

charged the plaintiff from delivering the cargo, and thenceforth continually afterwards refused to perform the agreement. The defendant, after pleading several pleas to the whole declaration, pleaded, thirdly, as to so much of the breach as related to the discharging the plaintiff from delivering the cargo, and to the refusing to perform the agreement, by a traverse of those allegations. Fourthly, as to so much of the breach as related to the defendant's having, before the arrival of the ship, discharged the plaintiff from delivering the cargo, and refused to perform the agreement, that, before the arrival of the ship, the defendant retracted his discharge and refusal. Fifthly, as to the “residue of the said breach,” by traversing the allegation of the plaintiff's readiness and willingness to deliver the cargo. At the trial, a verdict was found for the plaintiff upon all the issues but the fifth, and that issue was found for the defendant. In the judgment roll the damages were assessed “on occasion of the breach of promise in the declaration assigned (other than the part of the said breach in the plea mentioned),” at a certain sum; and the roll concluded by stating that the plaintiff is in mercy as to the premises, as to the issue found for the defendant on the fifth plea:—*Held*, on error, affirming the judgment of the Court below, that, if the words “the residue of the said breach” were to be construed as meaning such part of the breach as was uncovered by the third and fourth pleas, the residue was nothing, and the plea was immaterial, as the third plea covered the whole of the breach; but if, on the other hand, the words in question were to be taken as relating to so much of the breach as was uncovered by the fourth plea, and if that plea covered only that part of the breach which related to what took place before the arrival of the ship at B., as the third and fourth issues had been found for the plaintiff, the issue raised by the fifth plea was altogether immaterial, and the plaintiff was substantially entitled to judgment non obstante veredicto, and therefore that the defendant had no cause to complain; so that, in either view, the fifth plea was wholly immaterial.

(*a*) See the case, where the pleadings are fully set out, 4 Exch. 345.

the plaintiff has within thereof complained. And as to the issue secondly within joined, the jurors aforesaid on their oath aforesaid further say, that the within-mentioned cargo of congou tea was consigned to and for account of the plaintiff, in manner and form as in the declaration is alleged. And as to the issue thirdly within joined the jurors aforesaid on their oath aforesaid further say, that the defendant did discharge the plaintiff from delivering the said cargo or any part thereof, and refuse to buy or pay for the within-mentioned one-third interest in the said cargo or any part thereof; and that the defendant did refuse to receive or sell the said cargo or any part thereof, and to observe, perform, and fulfil the within-mentioned agreement or any part thereof, in manner and form as in the within-mentioned breach of promise is in that behalf within alleged. And as to the issue fourthly within joined, the jurors aforesaid on their oath aforesaid further say, that the defendant did not retract or withdraw the discharge or refusal or either of them in the said breach mentioned, nor did the plaintiff refuse to deliver, nor was the defendant ready or willing to receive, the said cargo or any part thereof, according to the said agreement, in manner and form as the defendant has within in his fourth plea alleged. And as to the issue fifthly within joined, the jurors aforesaid on their oath aforesaid further say, that the plaintiff was not ready or willing to deliver to the defendant the said cargo or any part thereof, in manner and form as in the declaration is in that behalf within alleged. And as to the issue lastly within joined, the jurors aforesaid on their oath aforesaid further say, that the plaintiff did not cause or procure the defendant to enter into or make the said agreement or promise, nor was the defendant induced to enter into or make, nor did the defendant enter into or make, the said agreement or promise through or by means of fraud, covin, or misrepresentation, in manner and form

1850.
M'CLURE
v.
RIPLEY.

1850.
 M'CLURE
 v.
 RIPLEY.

as in the defendant's last plea is alleged. And they assess the damages of the plaintiff, on occasion of the breach of promise in the declaration assigned (other than the part of the said breach in the fifth plea mentioned), over and besides his costs and charges by him about his suit in this behalf laid out, at 1423*l.*, and for those costs and charges at 40*s.*; and hereupon the said justices have prefixed &c., next to the said parties to come before the Barons of the Exchequer of our Lady the Queen at Westminster, to hear judgment &c. Whereupon all and singular the premises being seen and by the Court here fully understood, and mature deliberation being had thereon, it is considered that the plaintiff do recover against the said defendant his said damages, costs, and charges by the jurors aforesaid in form aforesaid assessed; and also 543*l.* 9*s.* 10*d.* for the said costs and charges by the said Court here adjudged, of increase to the plaintiff, and with his consent, according to the form of the statute in such case made and provided, which said damages, costs, and charges amount in the whole to 1966*l.* 9*s.* 10*d.*; and the defendant in mercy &c. And the plaintiff is also in mercy as to the premises whereof the issue above joined on the said fifth plea is found for the defendant by the said jury in form aforesaid; and let the defendant go thereof without day, &c."

Mellish (*Unthank* with him), for the plaintiff in error. —The judgment of the Court below ought to be reversed. The issue raised by the fifth plea is found for the defendant, and that plea is a complete answer to the whole cause of action disclosed by the declaration. The declaration in truth contains two breaches, the one relating to a period before the arrival of the vessel at Belfast, and the other to the time after such arrival. The damages are not assessed upon the whole declaration, but upon "the breach of promise in the declaration assigned, other than the part

of the said breach in the fifth plea mentioned." The fifth plea, which is pleaded to the *résidue* of the said breach, is directed to that part of the declaration to which the fourth plea is not pleaded. The refusal to perform the contract before the stipulated time has arrived, is no ground of action. That being so, and the fourth plea being directed to that supposed breach, and the fifth plea being pleaded to the residue, and being found for the defendant below, he was properly entitled to judgment. [*Cresswell*, J.—The defendant's pleader, by the language of the pleas, has treated the declaration as containing one breach only. The fifth plea, is "as to the residue of the said *breach*."] That allegation means the *whole* breach assigned. The breach may be considered as divided into two distinct parts. The word "residue" clearly refers to that part of the declaration which is not covered by the preceding plea, inasmuch as the first plea is pleaded generally to the whole declaration, and the third also; and then the fourth plea, which immediately precedes the plea in question, is only pleaded to a part of the breach; and the fifth plea, which is pleaded to the residue, must of necessity be taken as pleaded to that part which had been left unanswered by the preceding plea. [*Maule*, J.—Does not the "residue" mean what remains uncovered by the third and fourth pleas? in which case the residue would amount to nothing, and the plaintiff would be entitled to judgment on that issue, notwithstanding the verdict in favour of the defendant. *Erle*, J.—It appears to me that that is the solution of the question, namely, that the residue does amount to nothing. *Maule*, J.—If the plaintiff be entitled to judgment on that issue non obstante veredicto, the defendant has no cause of complaint.]

Martin (*J. Henderson* with him), *contra*, was not called upon.

1850.
 M'CLURE
 v.
 RIPLEY.

1850.
M'CLURE
v.
RIPLEY.

PATTERSON, J.—The proceedings in this case are rather singular. The declaration sets out a specific contract, and states a breach, in language which may apply to either of two states of things. The alleged contract is, that the plaintiff agreed to sell, and the defendant to buy, one-third interest in a cargo of tea, on or after the arrival of the vessel at Belfast. The breach is, that the defendant, before the arrival of the vessel with the cargo at Belfast, wholly discharged the plaintiff from delivering the cargo at that place, and then, and thenceforth continually afterwards, wholly refused to perform the agreement. That allegation would cover the refusal to perform the agreement at the time the discharge was given, before the arrival of the vessel at Belfast, and also any subsequent refusal, if there were any. If the cause of action were to depend upon a refusal to receive the cargo after the vessel had arrived, then, on the supposition that there had been no discharge, the averment of readiness and willingness, which is contained in the declaration, might have been material. But, on the other hand, if there was a discharge, the averment of readiness and willingness would not be material. The first plea denies the contract alleged. The third plea denies altogether any discharge or any refusal to receive the cargo, and manifestly applies to the whole declaration. As to the fourth plea, the learned counsel contends, and perhaps rightly, that it is confined to that which took place before the arrival of the vessel at Belfast, namely, to a discharge at that time, and the refusal to complete the agreement. The fifth plea is as to the residue of the breach, and is a mere traverse of the plaintiff's readiness and willingness to deliver the cargo. Now, if the fifth plea is to be construed with reference only to the fourth plea, and the contention is right with respect to the meaning of that fourth plea, (which I do not say it is not,) then there would remain a residue to be answered, because the breach being, that, before the arrival of the vessel at

Belfast, the defendant discharged the plaintiff from delivering the cargo, and then and thenceforth continually refused to perform the agreement; and the fourth plea being pleaded only to the refusal to perform the agreement before the arrival at Belfast, the refusal to perform the agreement after the arrival there would be left wholly unanswered. Thus the contention is, that the fifth plea, by the word "residue," means the refusal, if any, after the arrival at Belfast. The issue on that fifth plea might have been material, provided the fourth plea had been found for the defendant as to the retraction; and in that case it might have entitled the defendant to the judgment of the Court upon the whole record. But the issue on the fourth plea being found against the defendant, that is to say, that he did not retract his discharge, and the issue on the third plea being also found against him, namely, affirmatively that he did discharge the plaintiff from delivering the cargo, the issue upon the fifth plea, at all events, becomes immaterial, inasmuch as there was no necessity for any readiness and willingness to be averred, if there was really and truly a discharge, which the jury have found there was. The real and true substance of what is contended appears to me to be neither more nor less than this: that whereas the judgment is entered for the defendant on the fifth issue, (the verdict being for him upon that issue,) and that the plaintiff, as to so much, shall be in mercy, such entry is not a proper entry, but that the judgment ought to be entered for the plaintiff non obstante veredicto on that issue. In that view of the case, I do not conceive that the defendant can be entitled to reverse this judgment, because it is entered for him on that part, whereas it ought to have been entered for the plaintiff; unless, indeed, Mr. *Mellish* is right in his contention, that, the assessment of damages being made on the breach, excluding the part of it covered by the fifth plea, there is nothing left in the declaration sufficient to sustain the assessment of damages. That, however, I take it, is not the case, be-

1850.

M'CLURE

v.

REPLBY.

1850.
M'CLURE
v.
REPLAY.

cause really the issue is immaterial with respect to the assessment of damages. There could be no assessment on it. The declaration would be good enough without any averment of readiness and willingness, supposing there were only an averment of discharge, and that averment were traversed and found for the plaintiff. The assessment of damages would be on the nonperformance of the contract, and not upon the question, whether the plaintiff was ready and willing or not. This view of the case proceeds on the assumption that the "residue" means the residue after the fourth plea. Whether that be the proper construction or not, it is not now necessary to decide. I do not say it is not. On the other view of the case, that the "residue" is to be construed as having reference to both the third and fourth pleas, the fifth plea is quite idle and immaterial, because there is no residue left, and the plea is an answer to nothing. It is just as much irrelevant as if it had traversed something not contained by averment or implication in the declaration. In such a case the plaintiff would be entitled to judgment. On either construction, we all agree that the judgment of the Court below is right, and ought to be affirmed.

Judgment affirmed.

1850.

ASHPITEL v. SERCOMBE.

Feb. 7.

THIS was a bill of exceptions to the ruling of *Cresswell*, J., on the trial of the cause at the Devonshire Spring Assizes, 1847. The action was brought by the defendant in error, the allottee of shares in a projected Railway Company, to recover 262*l*. 10*s*., being the amount of his deposits, the scheme having proved abortive. The declaration was in assumpsit for money had and received, and the defendant pleaded non assumpsit, upon which issue was joined.

The material facts stated in the bill of exceptions to have been proved on the part of the plaintiff, were as follows:—In July, 1845, a Joint-stock Company, called “The Metropolitan Railways Junction Company,” was provisionally registered, pursuant to the 7 & 8 Vict. c. 110; and, in

In July, 1845, a Railway Company was provisionally registered, and a prospectus issued, headed —“Capital, 2,500,000*l*., in 100,000 shares of 25*l*. each.” On the 6th of October, 1845, the plaintiff applied for 200 shares by letter, in which he said, “I agree to accept the same or any portion thereof, subject to the provisions of the subscribers’ agreement; and

I further agree to execute the same and any other agreement or deeds, and to pay the deposit when required.” On the 11th of October a letter of allotment of 100 shares was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding—“I beg also to inform you, that scrip for the shares will be delivered to you in exchange for this letter and receipt, upon your executing the parliamentary contract and subscribers’ agreement, which lies here for signature until further notice, and afterwards at such other places as will be hereafter notified.” The plaintiff, who resided at Exeter, paid the deposit on the 20th of October, and on the 3rd of December the subscribers’ agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It did not appear, however, that he was called upon to execute it, nor that any notice was given to him that the deed was at Exeter. The subscribers’ agreement, which bore date the 15th of October, authorised the directors to take such measures and incur such preliminary expenses as they might think advisable, to increase or diminish the capital of the Company, to extend the railway, or, if they should think fit, to abandon the undertaking. It also specially authorised them to apply the deposits in payment of the expenses, and the deposits were so applied; but the undertaking was abandoned in consequence of the allottees not furnishing sufficient funds to carry it on, and without any fraud or misconduct on the part of the managing committee. On the winding up of the concern, a committee of inquiry had been appointed, and the defendant, one of the managing committee, handed to them the minute-book, containing an entry made by the secretary of the Company in the course of his duty, of a certain resolution proposed by the defendant at a meeting of the committee of management. In an action by the plaintiff to recover back his deposits upon a failure of consideration, the learned Judge ruled that this resolution was evidence against the defendant, and he told the jury that, if they thought that the project had been abandoned as abortive at the time the action was commenced, they should find for the plaintiff. On a bill of exceptions to this ruling,—*Held*, first, that the learned Judge was right in admitting the resolution in evidence.

Secondly, that the direction of the learned Judge was correct, since the plaintiff’s claim was founded on the failure of the project, and his want of consent or acquiescence in the application of the money, and there was no evidence of consent or acquiescence besides the letters and the subscribers’ agreement; and, the latter document not being in existence at the time of the plaintiff’s application for shares, he was, by his letter of the 6th of October, subjected only to the terms of such an agreement as the directors might properly call on him to execute, and that the agreement in question was not of that description, inasmuch as it purported to give the directors larger powers than the 7 & 8 Vict. c. 110, s. 23, authorised them to assume; and also purported to enable them to expend the deposits in the exercise of such excessive powers.

1850.
ASHPITEL
v.
SHECOMBER.

the following month, a prospectus was published and duly registered, headed: "Capital, 2,500,000*l.*, in 100,000 shares of 25*l.* each. Deposit, 2*l.* 12*s.* 6*d.* per share." The prospectus stated, amongst other things, that the object of the line of railway was to connect the various railways leading to the metropolis, so that traffic might be transferred from one such line to the other, without passing through London, and to connect the counties of Essex, Hertford, Middlesex, Buckingham, Surrey, and Kent.

A provisional committee of the Company was appointed, published, and registered, consisting of eighty persons, of which the defendant, with his assent, was one. A meeting of the provisional committee was held on the 22nd of September, 1845, at which the defendant was present. It was resolved, that fourteen gentlemen, then named, be appointed managing directors of the Company, with power to add to their number. The defendant was, with his assent, appointed one of the fourteen; and these managing directors were sometimes called the directors, sometimes the managing committee, and sometimes the committee of management. Before the 2nd of October, 1845, the managing directors reduced the capital of the Company from 2,500,000*l.* to 2,000,000*l.*, alleging that the estimate of capital was larger than was necessary for the completion of the line; and they thereupon published a notice thereof in the newspapers of the 2nd of October, 1845.

On the 10th of October, 1845, the defendant and others, as promoters, signed a consent to be the acting provisional committee of the Company, and to take shares in the undertaking.

On the 21st of October, 1845, a list of the acting provisional committee of the said railway was duly registered by the solicitor of the Company, including the name of the defendant. The following letter of allotment was issued by the committee of management to the plaintiff, on the day on which it bears date, and the following bankers' receipt was given to the plaintiff, by the authority of such

committee, on the day on which it bears date, upon payment by the plaintiff of the money in such receipt mentioned:—

“No. Shares.

“Metropolitan Railways Junction Company.

“(Provisionally registered, pursuant to 7 & 8 Vict. c. 110.)

“11, Clement’s Lane, London,

“11th October, 1845.

“Sir,—The Committee of Management having allotted to you 100 shares of 25*l.* each in this undertaking, I am instructed to request that you will pay the deposit thereon of 2*l.* 12*s.* 6*d.* per share, (amounting to 262*l.* 10*s.*.) to one of the undermentioned bankers, who will sign the receipt at the foot thereof, on or before Monday, the 20th of October instant, or the directors will be empowered to cancel the allotment. I beg also to inform you, that scrip for the shares will be delivered to you in exchange for this letter and receipt, upon your executing the Parliamentary contract and subscribers’ agreement, which lies here for signature until further notice, and afterwards at such other places as will be hereafter notified.

“By order of the Board,

“JOHN CHEESE, Secretary.

“To J. C. Sercombe, Exeter.”

[Then followed a list of bankers.]

Bankers’ Receipt.

“No. 1043.

October 20, 1845.

“Received on account of the Committee of Management of the Metropolitan Railways Junction Railway Company, the sum of Two hundred and sixty-two pounds, Tenshillings.

“£262 : 10 : 0

“For CURRIE & Co.

“W. HOWARTH.

“This receipt and letter are to be exchanged for scrip certificates, at the office of the Company.”

1850.
ASH PITEL
v.
SERCOMBE.

1850.
 ASHPITEL
 v.
 BENSON.

At a meeting of shareholders, held on the 5th of January, 1846, pursuant to advertisement, a committee of five shareholders, with the addition of an accountant, was appointed to investigate the accounts of the Company. Such committee met from time to time at the Company's offices, No. 11, Clement's Lane, and there examined the books, cheques, and other documents of the Company, which were laid before them by the secretary of the Company by order of the chairman of the Company (who was also chairman of the committee of management). The said chairman, and other members of the committee of management, and, among others, the defendant, attended there from time to time while some of the documents were being examined, and, while such books were lying on the desk for the examination of the committee of shareholders. And thereupon and after giving the evidence aforesaid, the counsel for the plaintiff tendered and offered to read in evidence, and (after the exception of the counsel for the defendant to the admissibility of the said evidence hereinafter mentioned) did give in evidence, a certain resolution in one of the books of the Company; namely, a minute-book kept and written by the secretary of the Company, in the course of his duty, and purporting to be a resolution made at a meeting of the committee of management, and purporting to have been proposed by the defendant, which said resolution was as follows:—

“ 22nd September, A.D. 1845.

“ It was proposed by William Hurst Ashpitel, Esq., and seconded by John Benson, Esq.—‘ That the solicitors and promoters of the Company will not in any way seek for payment of their expenses from the provisional committee, but will only look to the deposits; and the solicitors, being present, assented thereto.’ Carried unanimously.”

That, after the examination of the accounts of the Com-

pany by the committee of shareholders, a meeting took place between them (as such committee) and the committee of management, at which the defendant acted as chairman of the committee of management, and at which the accounts of the Company were discussed. The plaintiff further gave in evidence, that 65,900 shares in the Company, and no more, were allotted to various persons, upon letters of allotment similar to that issued to the plaintiff; and that the sum of between 16,000*l.* and 17,000*l.*, and no more, was paid by such allottees, including the plaintiff, upon the shares so allotted; and that such sum would not have enabled the Company to go before Parliament according to the Standing Orders, but that a deposit to the amount of 150,000*l.* was required for that purpose; and it was further proved, that a sum of 16,325*l.*, or thereabouts, had been expended by the committee of management in expenses incidental to the line, and in advertisements, and surveying; that is to say, 6000*l.* had been so spent, and a debt of above 10,000*l.* incurred for similar purposes. The counsel for the plaintiff also gave in evidence divers matters and things, in order to prove that the said undertaking could not, by reason of the want of sufficient monies, and by the failure of the majority of the allottees to pay up their deposit, be carried out, and that the same had thereupon, and before the commencement of this suit, been abandoned as abortive.

The evidence on the part of the defendant was as follows:—The survey of the line by the engineer of the Company was commenced in August, 1845, and about 122 miles of the line were surveyed, and plans and sections for the same were prepared and deposited, pursuant to the Standing Orders of Parliament, and great expenses were thereby incurred. The notices of an intended application to Parliament in the session of the year 1846, for a bill to carry out the undertaking, were given to the landowners along the line, and otherwise, pursuant to the Standing

1880.
 ASHPITEL.
 v.
 SHROCKEN.

~~THE~~
~~REPORT~~
~~OF~~
~~THE~~

of Parliament, and great expenses were thereby incurred; and, at a meeting of the shareholders of the Company, on the 19th of December, 1845, such meeting resolved that a further sum of 500*l.* should be expended in the service of notices on the landowners.

On the 6th of October, 1845, the plaintiff wrote and sent to the provisional committee of the Company a letter of application for shares, of which the following is a copy:—

“To the Provisional Committee of the Metropolitan Railways Junction Company.

“11, Clement’s Lane, Lombard-street.

“Gentlemen,—I request you to allot me 200 shares in the undertaking, and I agree to accept the same, or any portion thereof, subject to the provisions of the subscribers’ agreement; and I further agree to execute the same, and any other agreement or deeds, and to pay the deposit when required.

“*Name*—J. C. SERCOMBE.

“*Residence*—Exeter.

“*Description*—Merchant.

“*Date*—6th October, 1845.

“*Reference*—J. ADDES, Esq.”

The Parliamentary contract and subscribers’ agreement were prepared by the Company, and are dated the 15th of October, 1845, and were then ready for the execution of the allottees, and on the 3rd of December, 1845, such deeds were sent to Exeter, where the plaintiff then resided, for execution by the allottees there. The plaintiff had an opportunity of executing the deeds, but did not execute them. Several of the allottees did execute the deeds, and to such of the allottees scrip for their shares was delivered, upon their execution thereof.

The subscribers’ agreement, which was made between

the several persons whose names were subscribed and seals affixed in the schedule thereto, of the first part, and certain trustees of the second part, after reciting the objects of the Company, appointed certain persons, (amongst whom was the defendant,) as the managing committee or directors of the undertaking, and, amongst other provisions, it declared, "that, for the purposes of the undertaking, a capital not exceeding 2,000,000*l.* in the first instance should be raised and subscribed in shares of 25*l.* each; but that the committee of management, or directors for the time being, should have power of their own authority to increase such capital, in case the amount of the engineer's estimate (which was not yet completed) for the main line of the railway should exceed that amount, and to raise the requisite additional capital by shares to be allotted to such persons, or otherwise, in such manner as the committee should think fit; and also from time to time, if they should think proper, so to increase or diminish the capital for the time being, provided that in such last case such increase or diminution of capital should previously be assented to by a majority, in the proportion of three to two at least, of the subscribers," &c. "That, in case any subscriber should neglect or refuse to pay any money which he should be required to pay, for the space of one calendar month, it should be lawful for the committee or directors to pass a resolution declaring the shares of the defaulting party forfeited," &c. "That the committee shall have full power to take such measures as they may deem expedient to carry the undertaking into effect, and, for that purpose, to cause such surveys and estimates to be made as they may think advisable, and for all or any of the purposes aforesaid, and for examining or testing the correctness of the plans, estimates, and calculations of the promoters of any competing or other lines of railway, or of any party opposing the undertaking," &c. "With full power also, if the committee or directors shall think fit, to extend the said rail-

1850.

ASHPITEL
v.
SHERCOMBE.

1850:
 ASHPITEL
 " .
 SERCOMBE.

way to any distances whatsoever beyond the proposed termini, or either of them, in such manner as the committee or directors shall think fit, or to abandon or defer the said undertaking, or any part thereof," &c. " And also, to make application to Parliament in the ensuing session for an Act or Acts for all or any of the purposes aforesaid, &c.; and to take such proceedings in Parliament, or elsewhere, as they may deem expedient, for the purpose of opposing or altering the provision of any bill or bills that may be solicited for the establishment of any railway or other work or undertaking which may, in their judgment, interfere with, or tend to defeat or impede the accomplishment or success, or to affect its interest," &c. " That the committee or directors shall have full power, out of the money which shall come to their hands, or to be placed to their credit by way of deposit, or payment of calls, or otherwise in relation to the undertaking, to make such deposit or investment as are or may be required by the Standing Orders of both or either of the Houses of Parliament; and also to pay or allow to each director or member of the managing committee a fair and reasonable sum for his trouble and loss of time, as well in respect of his office or capacity of member of the managing committee or director as in that of sub-committee man, as the managing committee or directors shall think right; and also to pay and allow all such fees, salaries, and recompense to bankers, counsel, solicitors, secretaries, engineers, brokers, clerks, servants, and other persons who may be employed by them, or may have been already employed in relation to the undertaking, as they shall think right; and generally to apply such monies in and towards the fulfilment and enforcement of any bargains, engagements, contracts, arrangements, resolutions, or agreements into which they may have entered, or into which they are hereby empowered to and shall or may enter, for the purposes aforesaid, and towards the costs of any works or proceedings connected therewith, and in

and towards the soliciting, supporting, or opposing such bill or bills in Parliament, as hereinbefore mentioned, and in obtaining the necessary Act or Acts for carrying out the undertaking, and generally in paying and satisfying all other costs, charges, expenses, and liabilities, which they, or either of them, may sustain or incur, or which may have been already sustained or incurred in relation to the said undertaking, or otherwise, in pursuance of or under and by virtue of these presents, or in the execution or enforcement of the agreements, provisions, and stipulations herein contained," &c.

Upon the counsel for the plaintiff tendering in evidence the resolution of the 22nd of September, 1845, contained in the said minute-book, the counsel for the defendant insisted that the resolution was not admissible evidence against the defendant, for that the entries of a living person who might be called as a witness were not admissible evidence of the facts and occurrences stated in such entries. The learned Judge overruled the objection, and admitted the resolution in evidence, and in summing up directed the jury, "that if they thought that the said project had been abandoned as abortive at the time the said action was commenced, they should find a verdict for the plaintiff." To the above ruling and direction of the learned Judge the counsel for the defendant tendered a bill of exceptions, and a verdict was found for the plaintiff for 262*l.* 10*s.*, upon which judgment was entered up, and a writ of error brought.

The errors assigned were in substance, that the learned Judge allowed the resolution of the 22nd of September, 1845, to be given in evidence, whereas it was not good and admissible evidence. Also, that the direction of the learned Judge was wrong, inasmuch as the fact that the project had been so abandoned at the time the action was commenced was not sufficient to entitle the plaintiff to the verdict.

1850.

 ASHPITEL
 " .
 SERBOONER

1850.

ASHPITEL
v.
SHECOMBE.

The case was argued (a) (June 16, 1849,) by

Crowder (*Montague Smith* with him), for the plaintiff in error.—First, the resolution of the 22nd of September, 1845, was not admissible in evidence against the plaintiff in error. All that was shewn was, that the book in which the resolution in question was entered was a minute-book kept by the secretary, who attended with it at the board of the managing committee, of which the plaintiff in error was one. It did not appear that he ever saw the resolution, nor was there any evidence that he was present at the board on the 22nd of September, 1845. This is not like the case of an entry made by the clerk of a tradesman in the ordinary course of business; nor is the resolution admissible as an entry made by a deceased person, but, the secretary being alive, he ought to have been called.

Secondly, the direction of the learned Judge was wrong. Upon the facts of this case, the action is not maintainable. [He referred to the 7 & 8 Vict. c. 110, ss. 2, 3, 4, and 23.] The deposits were paid upon the terms of the letters of application and allotment, and consequently subject to the provisions of the subscribers' agreement, which empowers the directors to expend the deposits for the purpose of carrying the scheme into execution. That distinguishes the present case from *Walstab v. Spottiswoode* (b). Besides, the 23rd section of the 7 & 8 Vict. c. 110, authorises the promoters of a Company provisionally registered to allot shares and receive deposits by way of earnest thereon, at a rate not exceeding 10*l.* per cent. on the amount of every share, and in the case (amongst others) of Railway Companies, such further sum as may be required by the Standing Orders of either House of Parliament, before obtaining

(a) Before *Patteson, J., Coleridge, J., Maule, J., Cresswell, J., Wightman, J., Erle, J., and Williams, J.*
(b) 15 M. & W. 501.

an Act of Parliament. The case of *Garwood v. Ede*(a) no doubt differs from this, inasmuch as there the plaintiff had executed the "Parliamentary contract," and also the "subscribers' agreement;" however, in *Clements v. Todd*(b) the plaintiff had never in fact executed either; but the letter of application having contained the usual undertaking to execute those documents when required, it was held, that the plaintiff had paid his money upon the same terms as if he had executed them. In *Jones v. Harrison*(c) the letter of allotment contained this term:—"The directors assume the right to apply the amount paid for deposits in discharge of any liabilities incurred by them under the general powers vested in them for the prosecution of the undertaking;" and it was held, that the directors had authority to lay out the deposits in such necessary expenses as had been incurred by them in the prosecution of the scheme, and, all the deposits having been so expended, that the plaintiff was not entitled to recover. The principle of that decision must govern this, the only difference between the two cases being, that there the terms were embodied in the letter of allotment, here another document is referred to as containing them. But, further, it is submitted that *Walstab v. Spottiswoode* cannot be supported. That case was in its circumstances peculiar; for, although the scheme had been provisionally registered, nothing had been done with reference to a subscribers' agreement, or the issuing of scrip. The important fact upon which the decision proceeded was, that the directors had determined not to issue any scrip, and it was assumed that the doctrine in *Nockels v. Crosby*(d) applied in all its particulars. Some preliminary expenses must, however, be necessarily incurred by the promoters of these schemes; and can it be said that they engage to guarantee the formation of the Company, or to be

1850.

ASHPITEL
v.
SHEBOURNE.

(a) 1 Exch. 264.
(b) Id. 268.

(c) 2 Exch. 52.
(d) 3 B. & C. 814.

1850.
 ASHFITEL
 v.
 SKECOMER.

responsible for the expenses if it fail, though without any fault on their part? They are trustees for the shareholders, and as such are bound to use their best endeavours to carry out the undertaking. The 7 & 8 Vict. c. 110, s. 23, evidently means that the promoters shall have power to expend the amount which they are thereby authorised to receive as deposits, in such acts as are necessary for constituting the Company; but no such authority would be required if they are to be responsible out of their own funds. In addition, the Standing Orders of Parliament require a deposit of 10*l*. per cent. on the amount of capital subscribed, which must be at least three-fourths of the estimated expense. This is not like the case where a particular thing alone is to be done, and no relation of partnership arises until that thing is accomplished; but during all the time intervening between the payment of the deposits and the obtaining the Act of Parliament there is a connection between the parties which prevents them from suing one another. It is immaterial whether they are promoters or subscribers: they are associated together for a common purpose, and are in the same situation as if they had met together and jointly done what was done: *Holmes v. Higgins*(a). In *Lucas v. Beach*(b), the plaintiff had entered into an express contract with the committee before he became a subscriber, and on that ground it was held that he was not precluded from recovering. [He also referred to *Reynell v. Lewis*(c), *Atkinson v. Pocock*(d), and *Vane v. Cobbold*(e).]

Butt (*Greenwood* with him), for the defendant in error.—First, the book containing the resolution was admissible in evidence, on the principle that, “in some cases the possession of documents, or the circumstance that a party

(a) 1 B. & C. 74.

(b) 1 M. & G. 417.

(c) 15 M. & W. 517.

(d) 1 Exch. 796.

(e) Id. 798.

has access to them, has been considered as a ground for affecting him with the admission of the facts stated in them:" Phillips on Evidence(a), *Alderson v. Clay*(b). The book in question was a minute-book of the committee of management, of which the plaintiff in error was a member, and was produced by him as such to the committee of shareholders, and examined by them in his presence, together with other documents relating to the undertaking.

Secondly, the direction of the learned Judge was correct. As the provisional registration continued in force for one year only, and it is found as a fact that the undertaking was abandoned as abortive, unless *Nockells v. Orosby*(c) and *Walstab v. Spottiswoode*(d) are bad law, the defendant in error is entitled to succeed. It is said that the letter of allotment must be read as subject to the provisions of the subscribers' agreement; but no such agreement was in existence at the time the allotment was made; and though one was afterwards drawn up, it does not appear that the defendant in error was aware of its contents. But, assuming that he was bound to execute a subscribers' agreement, his contract was a contract upon the terms of the prospectus, and he would only be bound to execute such an agreement as contained the powers and authorities conferred on the promoters of the Company by the 23rd section of the 7 & 8 Vict. c. 110. This deed gives them unlimited power either to increase or diminish the capital of the Company, also to extend the railway to any distance, and to apply the deposits in a manner wholly unauthorised by the statute. Such a deed no allottee could have been compelled to execute. The terms, "subject to the provisions of the subscribers' agreement," mean an agreement in pursuance of the statute. *Walstab v. Spottiswoode* expressly decided, that the application for

1850.

 ASHPITEL
 "v."
 SHERBOURNE.

(a) Vol. 1, p. 357, 9th edit.

(b) 1 Stark. 405.

(c) 3 B. & C. 814.

(d) 15 M. & W. 501.

1850.
 ASHFITEL
 v.
 SNEEDMAN.

shares, and the allotment and payment of the deposit, do not make the allottees and promoters in any respect partners in the proposed association. *Reynell v. Lewis*(a) and *Wyld v. Hopkins*(a) are authorities to the same effect. The 7 & 8 Vict. c. 110, does not alter the nature of the contract between the promoters and the subscribers, but the former are merely placed in the same position, after the concern is provisionally registered, as they were at common law. The deposit of each subscriber is a mere *earnest* until the whole is subscribed for, and if the promoters of the scheme think fit to proceed before that time, they do so at their own risk. Then *Nockells v. Crosby*(b) is an express authority in favour of the direction of the learned Judge, that, upon the final abandonment of the scheme as abortive, the plaintiff below was entitled to recover back his money. In the present case, the question was left to the jury in the same way as in *Wontner v. Shairp*(c). There the deed had been executed, yet, there being fraud, the plaintiff recovered. In *Garwood v. Ede*(d), the deed, which gave the directors power to dispose of the deposits, had been executed by the plaintiffs, and it was conceded that no fraud could be imputed to the directors, and that the whole of the deposits had been expended. In *Clements v. Todd*(e), the plaintiff paid his money on the same terms as the person who signed the deed. *Atkinson v. Pocock*(f), *Vane v. Cobbold*(g), *Jones v. Harrison*(h), and *Willey v. Parratt*(i), are the same in principle as *Garwood v. Ede*.

Crowder replied.—As to the admissibility of the resolution in evidence, he cited *Burnside v. Dayrell*(k). With respect to the other point, he argued that the plaintiff be-

(a) 15 M. & W. 517.

(b) 3 B. & C. 814.

(c) 4 C. B. 404.

(d) 1 Exch. 264.

(e) Id. 268.

(f) 1 Exch. 796.

(g) Id. 798.

(h) 2 Exch. 52.

(i) 3 Exch. 211.

(k) Id. 224.

low ought to have put in the subscribers' agreement, and have shewn that it contained terms enabling him to recover back his money if the scheme were abandoned. Also that the 23rd and 24th sections of 7 & 8 Vict. c. 110, empowered the promoters to expend the deposits for the purpose of carrying the scheme into effect.

1850.
 ASHPITEL
 v.
 SHROCKHURST

Cur. adv. vult.

The judgment of the Court was now delivered by

PATTERSON, J.—This was an action for money had and received, brought by the plaintiff, an allottee of shares in a proposed Railway Company, which had been abandoned before the commencement of the action, without any fraud or misconduct, against the defendant, one of the managing committee, to recover back the plaintiff's deposit. The plaintiff applied for shares on the 6th of October, 1845, by letter, in which he says, "I agree to accept the same, or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same, and any other agreement or deeds, and to pay the deposit when required." On the 11th of October, a letter of allotment was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding, "I beg also to inform you, that scrip for the shares will be delivered to you, in exchange for this letter and receipt, upon your executing the parliamentary contract and subscribers' agreement, which lies here (11, Clement's Lane, London) for signature until further notice, and afterwards at such other places as will be hereafter notified." The plaintiff resided at Exeter. He paid the deposit on the 20th of October, as required. On the 3rd of December, the subscribers' agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It was not, however, proved that he was called upon to execute,

1860.
ASHPITEL
v.
SEROOMBE.

nor that any notice was given to him that the deed was at Exeter. The subscribers' agreement authorises the directors to take such measures, and incur such preliminary expenses, as they may think advisable; also to extend the railway, or, if they shall think fit, to abandon the undertaking; and it also specially authorises them to apply the deposits in payment of the expenses; and the deposits have been so applied; but the undertaking was abandoned, in consequence of the allottees not furnishing sufficient money to carry it on.

On the trial of the cause, a bill of exceptions was tendered to the learned Judge, by the learned counsel for the defendant, on two grounds. The first ground was, that he had received in evidence a certain resolution, to which it was urged that the defendant was not sufficiently shewn to be a party. It appeared that, on the winding up of the concern, a committee of inquiry had been appointed, and the defendant had handed to them the minute-book, containing the resolution in question, as part of the proceedings of the directors. We think this an abundant recognition by the defendant, and that the learned Judge was quite right in admitting the evidence.

The other ground of exception was, that the learned Judge told the jury, that, if they thought that the project had been abandoned as abortive at the time the action was commenced, they should find a verdict for the plaintiff. There seems to be no doubt that the plaintiff, having paid his money for shares in a concern which never came into existence, or a scheme which was abandoned before it was carried into execution, has paid it on a consideration which has failed, and may recover it back as money had and received to his use, unless he can be shewn to have consented to or acquiesced in the application of the money which the directors have made. On these two grounds,—the failure of the project, and the want of consent or acquiescence,—the plaintiff's claim is founded. They are

both of them questions of fact, and ought both to be determined for the plaintiff, to enable him to recover.

We think it clear that the onus probandi on the first question is with the plaintiff, on the second with the defendant. That it is so with respect to the first cannot be questioned; and, as to the second, there seems no doubt that, in the absence of all evidence, documentary or other, the plaintiff cannot be presumed to have consented to the expenditure. Each of these questions, being one of fact, is for the jury, unless the evidence on either of them should consist of written documents only, in which case it must be determined by the Court.

In the present case the learned Judge left the first question only to the jury, and they having decided it in the affirmative, the verdict was directed for the plaintiff; and the ground of the exception is, that the verdict was directed to depend on the first question only, to the exclusion of the second. This direction is wrong, if there were any evidence for the jury on the second question, or if it were a question for the Judge, and he ought to have determined it in favour of the defendant. The case was treated, in some part of the argument for the defendant, as if the learned Judge had affirmed as a general proposition, that in all cases where a project has been abandoned as abortive, the deposit may be recovered; but that is not the right view of his decision, which was not general, but only that in this particular case there was no other question for the jury, and no question for the Judge which he ought to have decided for the defendant, and which would entitle him to a verdict.

It is necessary, therefore, to inquire—First, whether there was any evidence of consent or acquiescence in the application of the money besides the written documents, viz. the letters of application and allotment, and the subscribers' agreement; and, secondly, whether, if there were no such evidence, upon the true construction of these do-

1860.
 ASHPITEL
 v.
 SERCOMBE.

1850.
ASHPITEL
v.
SREBOOMER.

cuments, the directors were entitled to retain the whole or part of the plaintiff's deposit. As to the first question, there does not appear to be any evidence of consent or acquiescence, other than what may arise out of the letters and subscribers' agreement. The plaintiff is not shewn to have known of the expenditure in question, or of the power to make it, which the subscribers' agreement purports to give the directors. It was, indeed, given in evidence that the deed was sent to Exeter, where the plaintiff resided, and that he had an opportunity of executing it; but we do not think that his knowledge of or acquiescence in its contents can be inferred from these circumstances. The learned Judge, therefore, seems to us to have been right in not leaving this question to the jury.

The remaining question is, whether the Judge ought, on the true construction of the letters and subscribers' agreement, to have directed a verdict for the defendant. By the plaintiff's letter of the 6th of October, he applies for shares, to be taken subject to the provisions of the subscribers' agreement; and by the letter of the secretary, of the 11th of October, this proposal is accepted: and these two letters constitute the contract on which the plaintiff paid his money. If the application which has been made of that money is according to the terms of this contract, the plaintiff cannot recover it, and the direction was wrong. Now the terms of the subscribers' agreement given in evidence, do purport to authorise the expenditure in question; and if that agreement were such a subscribers' agreement as the plaintiff agreed by his letter of application to be bound by, he cannot recover. Did he, then, agree by his letter to be bound by this subscribers' agreement? The letter certainly does not refer to this agreement in particular, nor any specified agreement, nor indeed does the agreement given in evidence appear to have existed at the time of the application for shares, the 6th of October. Still less is there any ground for saying that the plaintiff was aware

of its contents. The secretary's letter, indeed, of the 11th of October, does speak of a subscribers' agreement as then lying for signature at London; but there is no evidence that in fact that instrument was then in existence, and when it is produced, it appears to have borne date the 15th of October. The plaintiff therefore was not, by his letter of the 6th of October, subjected to the terms of this particular deed, or of any specific deed, but to the terms of any such deed as the directors might properly call on him to execute. If the directors prepared such a deed, and gave him the opportunity of executing it, he might be bound by its terms, though he did not execute it; but if no deed at all, or no deed such as he could properly be called upon to subscribe, were prepared by the directors, the condition in the letter of application, that the shares should be accepted subject to the provisions of the subscribers' agreement, became inoperative; and in that event, the plaintiff would not be bound by the application of his money, for he does not by his letter agree in any other way to the expenditure of the deposits, than as such an agreement is comprehended in an agreement to be bound by such a subscribers' agreement as he may properly be called on to subscribe, if it should contain some authority to apply the money.

The question therefore is reduced to this,—was the agreement dated the 15th of October, and given in evidence, such a subscribers' agreement as the directors could properly call on the subscribers to execute—and it seems clear that it was not, inasmuch as it purports to give the directors a much larger power than the Act of 7 & 8 Vict. c. 110, s. 23, authorises them to assume, and also purports to enable them to expend the deposits on the exercise of such excessive power. The learned Judge therefore rightly decided that the written documents did not entitle the defendant to a verdict; and as there was no evidence for the jury of consent or acquiescence of the plaintiff in the ex-

1850.

ASHPITEL
v.
SHEKONER.

1850.
 ASHPITEL
 v.
 SARGCOMBE.

penditure of the deposit, the learned Judge was right in directing that, *in this case*, if the project was abandoned as abortive, the plaintiff was entitled to a return of his deposit. The judgment should therefore be affirmed.

Judgment affirmed.

Feb. 7.

DE BEAUVOIR v. OWEN.

A defendant in replevin avowed the taking of the goods for arrears of an ancient quit-rent issuing out of a tenement held of him as lord of a certain manor by fealty and 9s. rent. The plaintiff pleaded (*inter alia*) *non tenuit*. The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress was made on the 13th of May, 1845:—*Held*, (on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer), that, by the operation of the 2 & 3 Will. 4, c. 27, ss. 2, 3, and 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; and that the limitation need not be pleaded specially, but was available under the plea of *non tenuit*.

IN this case, a special verdict having been agreed to (a), and judgment entered up, the defendant below brought a writ of error thereon.

The declaration was in replevin, for a cart distrained in a certain barn, in the parish of West Ilsley, in the county of Berkshire.

Avowry.—That, at the said time when &c., the said barn in which &c., was parcel of a certain tenement called Hodcott Farm, with the appurtenances, situate and being in the county of Berks, and holden of the manor of Stratfield Mortimer, within the said county, by fealty, and the rent of 9s. yearly, to be paid at the Feast-day of St. Michael in every year, according to the old style and computation of time formerly used in this kingdom, of which said manor the defendant, before and at the time when &c., was the owner, and thereof lawfully possessed; and because the plaintiff held and occupied the said barn, with the appurtenances, in which &c., at the said time when &c., and because the sum of 2l. 14s. of the rent aforesaid, for six years next before and ending at the Feast-day of St. Michael, which was in the year of our Lord 1844, according to the said old style, at the said time when &c., was then due, in arrear, and unpaid to the defendant, he the

(a) See *Owen v. De Beauvoir*, 16 M. & W. 547.

defendant well avows the taking of the said cart, goods, and chattels in the said barn in which &c., so being a parcel of the aforesaid tenement called Hodcott Farm, with the appurtenances, and holden of the said manor of Stratfield Mortimer as aforesaid, and justly &c., as a distress for the aforesaid rent so then being due, in arrear, and unpaid to the defendant, according to the form of the statute in such case made and provided.—Verification and prayer of judgment, and a return of the said cart, goods, and chattels, together with the defendant's damages, &c.

1850.
DE BRAUVOIR
v.
OWEN.

Plea in bar.—First, that the said barn in which &c., was not parcel of the said tenement called Hodcott Farm, in manner and form as in the avowry alleged. Secondly, that the said barn in which &c., was not holden of the said manor, in manner and form as in the avowry alleged. Thirdly, that the defendant was not the owner and possessed of the said manor, in manner and form as in the avowry alleged. Fourthly, that no part of the said rent was due or in arrear, in manner and form as in the avowry alleged.—Issues thereon.

The special verdict stated the following facts:—That long before and on the 13th of May, 1845, the barn in the declaration mentioned was parcel of a certain tenement called Hodcott Farm, with the appurtenances, situate and being in the county of Berkshire; and that the same tenement was before and on the 11th of October, 1824, holden of the manor of Stratfield Mortimer within the said county, by fealty and the rent of 9s. yearly, to be paid at the Feast-day of St. Michael in every year, according to the old style and computation of time formerly used in this kingdom. The barn in the declaration mentioned was parcel of the same tenement during all the time last aforesaid, and holden of the said manor, by reason of being such parcel as aforesaid, during all the time last aforesaid, and the

1850.
DE BEAUVOIR
v.
OWEN.

said barn continued to be and was parcel of the same tenement and holden of the same manor as aforesaid, on and from the said 11th of October, 1824, until and on the 13th of May, 1845, and thence afterwards; unless by reason of no rent having been paid subsequent to the payment of 3*l.* 12*s.* hereinafter mentioned, and of the statute 3 & 4 Will. 4, c. 27, the said barn ceased to be so holden as aforesaid. On the 15th of January, 1825, the sum of 3*l.* 12*s.* was paid by Edward Tull, the then possessor and occupier of the said tenement, to the defendant, as and for the arrears of quit-rent due up to the 11th of October, being the Feast-day of St. Michael, according to the old style and computation of time formerly used in this kingdom, in the year of our Lord 1824, in respect of the said tenement, to the defendant as lord of the said manor. The defendant, before and at the time last aforesaid, and at the time of the making of the distress, was the lord and owner and possessed of the said manor; by reason of which payment, all arrears of the said rent due in respect of the said tenement up to the said 11th of October, 1824, were fully paid and satisfied; and nothing was paid in respect of any part of the said rent after the said 15th of January, 1825; and on the 13th of May, 1845, the defendant, then being such owner and possessed of the said manor as aforesaid, took the said carts, goods, and chattels in the declaration mentioned, in the said barn, as a distress for six years' arrear of the said rent alleged to have accrued due to him on and up to the 11th of October, 1844, being the Feast-day of St. Michael, according to the old style and computation of time formerly used in this kingdom. The said barn in which &c., was parcel of the said tenement called Hodcott Farm, in manner and form as in the avowry alleged, and the defendant was the owner, and possessed of the said manor, in manner and form as in the avowry alleged.

Errors having been assigned thereon, the case was argued, February 5, 1849 (a), by

1850.
 DE BRAUVOIR
 v.
 OWEN.

Cowling, for the plaintiff in error.—The first question is, whether the period of twenty years, mentioned in the 3 & 4 Will. 4, c. 27, commenced running from the time of the *last payment of rent*, viz. the 15th of January, 1835, or from the time when the *first arrear of rent accrued due*, viz. on the 11th of October, 1825. That depends upon the construction of the 2nd and 3rd sections of the 3 & 4 Will. 4, c. 27 (b). That Act does not profess to repeal any former

(a) Before *Patteson, J., Coleridge, J., Colman, J., Maule, J., Cresswell, J., Erle, J., Wightman, J., and Williams, J.*

(b) The following sections were referred to:—

Sect. 2. "That, after the 31st of December, 1833, no person shall make an entry or distress or bring an action to recover any land or rent but within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress or to bring such action shall have first accrued to the person making or bringing the same."

Sect. 3. "That, in the construction of this Act, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued at such time as herein-

after is mentioned; (that is to say), when the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall while entitled thereto have been dispossessed, or have discontinued such possession or receipt, then such right shall be deemed to have first accrued at the time of such disposition or discontinuance of possession, or at the last time at which any such profits or rent were or was so received; and when the person claiming such land or rent shall claim the estate or interest of some deceased person who shall have continued in such possession or receipt in respect of the same estate or interest until the time of his death, and shall have been the last person entitled to such estate or interest who shall have been in such possession or receipt, then such right shall be deemed to have first accrued at

1850.

DE BEAUVOIR

v.

OWEN.

statute, or to introduce a new system, but only modifies the prior law. In order, therefore, to understand its pro-

the time of such death; and when the person claiming such land or rent shall claim in respect of an estate or interest in possession granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt, then such right shall be deemed to have first accrued at the time at which the person claiming as aforesaid, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument," &c. [The rest of the section relates to persons entitled in reversion or remainder.]

Sect. 14. "Provided always, that, when any acknowledgment of the title of the person entitled to any land or rent shall have been given to him or his agent in writing, signed by the person in possession or in receipt of the profits of such land, or in receipt of such rent, then such possession or receipt of or by the person by whom such acknowledgment shall have been given, shall be deemed, according to the meaning of this Act, to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall

have been given at the time of giving the same, and the right of such last-mentioned person, or any person claiming through him, to make an entry or distress or bring an action to recover such land or rent, shall be deemed to have first accrued at and not before the time at which such acknowledgment, or the last of such acknowledgments, if more than one, was given."

Sect. 15. "Provided also, that, when no such acknowledgment as aforesaid shall have been given before the passing of this Act, and the possession or receipt of the profits of the land, or the receipt of the rent, shall not at the time of the passing of this Act have been adverse to the right or title of the person claiming to be entitled thereto, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or interest at any time within five years next after the passing of this Act."

Sect. 16. "Provided always, that if at the time at which the right of any person to make an entry or distress or bring an action to recover any land or rent shall have first accrued as aforesaid, such person shall have been under any of the disabilities hereinafter mentioned, (that is to

visions, it is necessary to refer to the 21 Jac. 1, c. 16, s. 1. The earliest case which arose on that statute is *Reading v. Royston* (a), where it was construed to mean that the entry must be within twenty years after the claimant is actually disseised or ousted. Such has been considered the true construction from that period up to the time of the passing of the 3 & 4 Will. 4. Therefore, in order to bar the claimant, he must not only have been out of possession and another in, but the possession of that other must have been adverse. The language of the 21 Jac. 1, c. 16, s. 1, is substantially the same as that of the 3 & 4 Will. 4, c. 27, s. 2, the latter statute merely extending to the case of rent the provisions of the former as to lands. If, then, the 2nd section of the latter Act had stood alone, the same construction must have been put upon it as on the former Act, and the same ingredients would have been requisite to bar the claimant. But the 3rd section shews that *some* alteration was intended to be introduced; and it is submitted that the intention was not to do away with

1850.
DE BEAUVOIR
v.
OWEN.

say,) infancy, coverture, idiocy, lunacy, unsoundness of mind, or absence beyond seas, then such person, or the person claiming through him, may, notwithstanding the period of twenty years hereinbefore limited shall have expired, make an entry or distress or bring an action to recover such land or rent at any time within ten years next after the time at which the person to whom such right shall first have accrued as aforesaid shall have ceased to be under any such disability, or shall have died, (which shall have first happened)."

Sect. 34. "That, at the determination of the period limited by this Act to any person for making

an entry or distress, or bringing any writ of quare impedit or other action or suit, the right and title of such person to the land, rent, or advowson for the recovery whereof such entry, distress, action, or suit respectively might have been made or brought within such period shall be extinguished."

Sect. 35. "That the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of this Act."

(a) 2 Salk. 423.

1850.

DE BRAUVOIR
v.
OWEN.

adverse possession, but with the difficulty of proving whether the possession was adverse or not. That such was the remedy intended is clear from a passage in the "First Report of the Commissioners on the Law of Real Property," p. 47, where it is said, "Great practical difficulty has arisen in determining what is adverse possession, and when it shall have been considered to have begun. This must generally be left as a question of fact for a jury; but there are some rules of law, *præsumptiones juris et de jure*, which absolutely prevent the possession from being considered adverse, and the expediency of which is very questionable, as they do not seem necessary for preserving rightful claims, and they greatly impair the healing tendency of the Statute of Limitations." To obviate that difficulty, the 3rd section of the 3 & 4 Will. 4, c. 27, renders the mere circumstance of the claimant being out of possession and another in, evidence of adverse possession, unless the legal presumption is rebutted in some of the modes pointed out by the statute. So that it is not enough to bar the claimant, that he is out of possession for a prescribed period, but another must be in. In this case no person could be in possession until the 11th October, 1825, therefore the statute would not run until after that time. That the statute was never intended to do away with adverse possession also appears from the following passage in the Report of the same Commissioners, p. 40: "We propose that the law should be rendered simple and consistent—by giving a uniform and certain effect to adverse enjoyment—by giving all persons alleging that they are unjustly deprived of their estates the same time for enforcing their claims, with a certain indulgence to claimants under disabilities—and by giving one remedy at law with regard to lands instead of the existing variety of remedies to which the different periods of limitation are attached." So far from doing away with adverse possession,

the statute treats the mere continuance of another party in possession as adverse. It was observed by *Patteson, J.*, in *Doe d. Jones v. Williams*(a), that, "from the language of the 15th section, it plainly appears that something or other was, after the Act passed, to be considered as adverse possession, which was not so before the Act passed; for in that section it seems to be considered that the possession, which, up to the passing of the Act, was not adverse as the law then stood, would, by the operation of the Act, become so on the very day after the Act passed, and that by relation; otherwise the provision as to the five years was not needed to protect the right of the party against whom such adverse possession might be set up." The 14th section, which renders an acknowledgment in writing given to the person entitled, or his agent, equivalent to possession or receipt of rent, also supports the construction contended for. [*Patteson, J.*—That section goes further; it says that "such possession or receipt, of or by the person by whom such acknowledgment shall have been given, shall be deemed to have been the possession or receipt of or by the person to whom or to whose agent such acknowledgment shall have been given."] The effect of the 2nd and 3rd sections of the statute is to bar the claimant, where twenty years have elapsed since his right accrued, whatever be the nature of the possession, except in cases falling within the 15th section: *Nepean v. Doe d. Knight*(b). But there must be some possession to affect the interest, for the statute will not run until it is possible to be dispossessed of what is claimed. The former part of the 3rd section applies to persons entitled to estates in possession, whether in fee or otherwise, the latter to those entitled in reversion or remainder. That section was not intended to explain, in every instance, the

1850.
 DE BEAUVOIR
 v.
 OWEN.

(a) 5 A. & E. 296.

(b) 2 M. & W. 894.

1850.
DE BEAUVOIR
v.
OWEN.

enactment contained in the 2nd section as to "the time at which the right to make a distress for any rent shall be deemed to have first accrued," but those cases only in which doubt or difficulty might occur: *James v. Salter* (a); as, for instance, whether the possession was to be considered as adverse, and when the adverse possession was to begin. As respects "land," the meaning of the section is clear, viz. that where the person in actual occupation, or in virtual occupation by receipt of the profits (and a person who lets from year to year is considered as such, sect. 35), shall be dispossessed or discontinue such possession or receipt, the period of limitation shall run from such dispossession or discontinuance, unless in either case there appears to have been a subsequent receipt of "any such profits;" that is, unless proof can be given of the receipt of any *portion* of the profits, in which case the time is not to run till such receipt; so that part payment has a similar effect to an acknowledgment in writing under the 1st sect. of the 9 Geo. 4, c. 14. The same construction ought to apply to the case of rent, otherwise there would be this incongruity, that the right to bring an action or make a distress would accrue before the rent was due. And, further, a person who came under disability between the time when the right to bring an action or make a distress is to be deemed to have first accrued, and when it did actually accrue, could not avail himself of the provisions of the 16th section. The phrase "while entitled thereto," means while entitled to the possession of the land or receipt of the profits; and, in this case, the plaintiff in error could not be entitled to the rent until the 11th of October, 1825. If the plaintiff in error had claimed as heir to his father, who had received the rent in January 1825, and had died after the 13th of May, he would have had twenty years

(a) 3 Bing. N. C. 544.

from his father's death before his right was barred. So also, if the rent had been conveyed to the plaintiff in error by any instrument, except a will, at any time after January, 1825: Sugd. Vend. & Pur. 617, 11th ed. If the words "or at the last time at which any such profits or rent were or was so received" be read literally, and as applicable to a virtual possession, it would follow that, in the case of a long lease, the lessor would be barred by the non-receipt of rent for twenty years, although the lease was running, which is inconsistent with the decision in *Grant v. Ellis* (a). But the 7th, 8th, and 9th sections shew that the right is not, in all cases of virtual possession, to be deemed to accrue on the last payment. Therefore, in order to make those sections consistent with the 3rd, the latter must be construed as meaning that the discontinuance of the receipt of the profits shall commence only from the time when the rent was payable. [He also referred to *Owen v. De Beauvoir* (b).]

1850.
DE BEAUVOIR
v.
OWEN.

Then with respect to the other point.—The fourth plea admits that the defendant in error held the premises of the plaintiff at the rent in the avowry alleged, and the only issue raised is, whether that rent was in arrear. He was, therefore, not entitled to shew that the right to recover the rent was barred by the statute.

Carrington, for the defendant in error.—The 3 & 4 Will. 4, c. 27, cannot be explained by the 21 Jac. 1, c. 16; for, as Lord Chancellor *Sugden* observed, in *The Incorporated Society v. Richards* (c), "There is a marked distinction between the old Statutes of Limitation and the present one. The former statutes only bar the remedy, but did not touch the right—possession at all times gave a certain right; but, under the new Act, where the remedy is barred, the right and title of the real owner are extin-

(a) 9 M. & W. 113.

(b) 16 M. & W. 547.

(c) 1 Dru. & W. 289.

1850.
 DE BEAUVOIR
 v.
 OWEN.

guished, and are, in effect, transferred to the person whose possession is a bar." The 3rd section includes this case. That and the 2nd section must be read together, as explaining one another. The right to make a distress is, by the terms of the 3rd section, to be deemed to have first accrued, not from the time when the rent was payable, but from the time of its last receipt. Wherever the legislature intended the statute to run from the last payment they have expressly said so, as in the 8th section. The words "disposition or discontinuance of possession," in sect. 3, do not apply to rent, which is provided for by the last branch of the section. [He then referred to the judgment of the Court in *Owen. v. De Beauvoir (a).*]

Cur adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.—This was the case of a distress, made by the plaintiff in error, for arrears of an ancient quit-rent, issuing out of a tenement held of him as lord of the manor of Stratfield Mortimer, by fealty and 9s. rent. Such a rent is clearly within the 2nd, 3rd, and 34th sections of the statute 3 & 4 Will. 4, c. 27, and the question turns entirely upon the construction to be put upon those sections. The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress, in respect of which this action is brought, was made on the 13th of May, 1845. If the twenty years mentioned in the 2nd and 3rd sections had then expired, the right and title of the plaintiff in error to the rent had become extinguished by sect. 34, and the tenement was no longer held of the manor by the rent of 9s. per annum. The question was therefore properly raised on the issue of non tenuit, without pleading the lapse of twenty years specially, notwithstanding

(a) 16 M. & W. 547.

ing the saving for disabilities in sect. 16. The necessity to plead a Statute of Limitations applies to cases where the remedy only is taken away, and in which the defence is by way of confession and avoidance; not where the right and title to the thing is extinguished and gone, and the defence is by denial of that right.

With respect to the argument, that the case falls within the reason which has been sometimes given for requiring the Statute of Limitations to be pleaded; that is, that the exceptions in favour of persons under disability might not be rendered useless, and they taken by surprise at the trial, by finding the Statute of Limitations then first relied on, it is to be observed, that the true reason for requiring the statute to be pleaded is, that it confesses and avoids the declaration, and therefore is not comprehended within any plea, which merely denies the whole or part of the declaration: *Gale v. Capern* (a), *Margetts v. Bays* (b). The general rule, that matter in confession and avoidance could not be given in evidence under a plea merely negative, was subject to an exception, real or apparent, in actions of assumpsit, in which many matters, which might have been pleaded in confession and avoidance, were, before the New Rules, allowed to be shewn under the general issue; and probably the reason for requiring the Statute of Limitations to be pleaded in assumpsit, and not allowing it to be comprehended among those matters in confession and avoidance, which might be shewn under the general issue, may have been the inconvenience suggested in this argument. But in the present case, the defence is not that the cause of action did indeed accrue, but not within the time of limitation, but that *the tenure alleged in the avowry was extinguished and put an end to before the time of the distress.*

Great difficulties undoubtedly present themselves to our

(a) 1 A. & E. 102.

(b) 4 A. & E. 489.

1850.
 DE BRAUVOIR
 v.
 OWEN.

minds in endeavouring to ascertain the meaning of the legislature in sects. 2 and 3; and those difficulties have been pressed upon us by the learned counsel with great force and ability, and we feel that it is impossible by any construction to avoid some apparent incongruity; but upon the best consideration which we can give to the case, we are compelled, by the express words of the 3rd section, to hold, that the construction put upon them by the Court below is correct.

The plaintiff in error was himself the person who received the last rent, and who remained entitled thereto. Taking such of the words of the 2nd and 3rd sections as are applicable to this case, we find it enacted, "that no person shall make a distress to recover any rent, but within twenty years next after the time at which the right to make such distress shall have first accrued to the person making the same; that the right to make such distress shall be deemed to have first accrued at such time as thereafter mentioned; that is to say, when the person claiming such rent shall have been in receipt of such rent, and shall, while entitled thereto, have discontinued such receipt, then such right shall be deemed to have first accrued at the last time at which such rent was so received." In this case, that last time was on the 25th of January, 1825, more than twenty years before the distress in question was made. It is obvious, that, as the rent due 11th of October, 1824, had been paid, and as no further rent was due till the 11th of October, 1825, the right to make a distress is, by the express words of the statute, deemed to have first accrued, and the twenty years therefore to have commenced many months before any rent which could be distrained for was due; and we are asked to put some construction upon the words, which shall avoid this apparent absurdity.

We cannot derive any assistance from the other words of the section, "at the time of such dispossession or discontinuance of possession;" for they are not applicable to

rent, but to land only; and, therefore, unless we give to the words "at the last time at which such rent was so received" their plain and direct meaning, we must read them as if they were "at the first time at which rent being due has not been received,"—a meaning of which the words as they stand in the statute are not capable. One of the arguments adduced to lead us to some such construction was, that, by adhering to the literal meaning of the words of the statute, we should be obliged to hold, that if a lease for fifty years rendering rent were made, and no rent received for twenty years, all right to rent for the remaining thirty years would be extinguished, and yet the right to have the land at the end of fifty years would remain. But that is not so; for these sections do not apply to leases on which a conventional rent is reserved, as was held by the Court of Exchequer, in *Grant v. Ellis* (a). But the two main objections to the construction adopted by the Court below are, first, that it requires the limitation of twenty years against a right of action or distress to begin, in the case of rent, from the time before the right to bring an action or to distrain had accrued, which it was urged was something so anomalous and unreasonable, that it raised a presumption against such being the real intention of the Act; and, secondly, that a person coming under disability between the time when the right of action, &c., is to be deemed to have first accrued, and the time when it actually did first accrue, would not be protected by the saving in sect. 16. It may be convenient, with a view to those objections, to consider what was the law respecting limitations of claims of real property, particularly of rents, before the passing of the Act in question. Those limitations depended on the stat. 32 Hen. 8, c. 2, and 21 Jac. 1, c. 16. The latter statute limited entries, and consequently ejectments, to twenty

1850.
 DE BEAUVOIR
 v.
 OWEN.

(a) 9 M. & W. 113.

1850.
 DE BEAUVOIR
 v.
 OWEN.

years after the right and title of entry accrued, and limited formedons in descender, remainder, or reverter, to twenty years after the title and cause of action first descended or fallen. This statute had no application to distresses, or to any action for rent, except actions of formedon. Real actions in general, and distresses for rent, were limited, at the time of the passing of the 3 & 4 Will. 4, as far as they were subject to limitation by the 32 Hen. 8, c. 2. The 1st, 2nd, and 3rd sections of this Act limited the time for bringing writs of right on the seisin of an ancestor to sixty years, possessory actions on the seisin of the ancestor to fifty years, and all actions on the seisin of the demandant to thirty years, respectively. Each of these terms began from the time of seisin of the ancestor or the demandant, not from the time of the first accruing of the action; and in the case of rent, the seisin to maintain such action must be actual seisin by receipt of rent^(a); so that, under this statute, the limitation for real actions for the recovery of rents ran from the last receipt, not from the accruing of the cause of action. By sect. 4 of this Act of Hen. 8, it is provided, "that no person shall make any avowry or cognisance for any rent, &c., and allege any seisin of any rent, &c., in the same avowry or cognisance, in the possession of his or their ancestor or predecessor, or in his own possession, or in the possession of any other whose estate he shall pretend or claim to have above fifty years next before the making of the said avowry or cognisance." And by sect. 6, if the avowrant, &c., could not prove the seisin within the time appointed, if the same seisin were traversed, he was barred. It was by these sections only that the time for making distresses for rent was limited, down to the time of the 3 & 4 Will. 4, c. 27. Upon these sections it was held, that they did not extend to a rent created by deed, or reserved on a gift in

(a) Littleton, ss. 235, 465.

tail, as to which there was no term of limitation: Sir W. *Foster's case* (a). It was also determined, that these sections did not require seisin in fact, but would be satisfied by seisin in law, which, before the statute, was sufficient to enable the person so seised to distrain, though not to maintain an assize, for which seisin in fact by payment was necessary. But whether the seisin were one in fact, as by payment of rent, or in law, as by attornment, or by actual seisin of some other service than the rent, as fealty, &c., or by the acquisition of an estate which authorised a distress without attornment, as by devise, &c., the time of limitation ran, not from the accruing of the right to distrain, but from the time of the seisin, in fact or in law, which time might be before the right to distrain accrued: *Bevil's case* (b); Litt. ss. 565, 585; and see the stat. 4 Anne, c. 16, ss. 9 and 10. It may also be remarked, that, in appointing the seisin as the point at which limitation should begin, the statute of 32 Hen. 8 followed the still older statutes of limitations; the Statute of Merton, 20 Hen. 3, c. 8, and that of Westminster 1st, 3 Edw. 1, c. 39, fixing a limitation from the time of seisin in real actions, and that of Westminster 2nd, 13 Edw. 1, stat. 1, c. 2, limiting the time for distresses for services in like manner. The present Act, therefore, in directing the limitation to run from a time before the right accrues, would not be adopting any new principle, but would be conformable to the law which prevailed from the time of Hen. 3 till 3 Will. 4. The form, indeed, in which this intention is expressed, is somewhat strange and paradoxical, in directing a right of action to be deemed to have first accrued, when none has accrued at all; but the words of the Act are certainly capable of this sense, which is, indeed, the most obvious one; and a similar arbitrary use of language is not without example in re-

1850.
 DE BRAUVOIR
 v.
 OWEN.

(a) 8 Rep. 64 b.

(b) 4 Rep. 8.

1850.
DE BEAUVOIR
v.
OWEN.

cent legislation; and the substance and effect of the provision, in pointing out the time from which limitation is to run, is nothing more than might be expected, looking to the law as it had long existed, and at the precedents of legislation on the subject. There does not therefore seem to be, in this respect, such a contradiction between the probable intent of the legislature and the construction of the words of the Act, adopted by the Court of Exchequer, as makes it necessary to have recourse to a forced construction to reconcile the words and the intent. The inconvenience of a person coming under disability after the receipt of rent, and before the right of action, &c. accrued, was strongly pressed, and is indeed more substantial; but it is to be observed, that the legislature, in passing this Act, has in a much more important instance left the rights of persons under disability unprotected, inasmuch as sect. 42, which bars the recovery of arrears after six years, has no proviso in favour of such persons. The circumstance, therefore, of their not being perfectly protected by the 16th section, does not afford a ground for presuming against a construction which involves that consequence.

We do not think it necessary to review some other arguments and possible cases which were put at the bar, nor to pursue the reasonings upon them, which will be found in the report of this case in 16 M. & W. 547. We proceed upon the words of the 2nd and 3rd sections of the statute, which are plain, and to which we do not feel ourselves justified in giving any other meaning than that which was given to them by the Court below.

Judgment affirmed.

1850.
}

MEMORANDA.

—◆—

IN this Vacation, owing to continued illness, Lord *Denman* resigned the office of Lord Chief Justice of the Court of Queen's Bench; in which he was succeeded by the Right Honourable *John Lord Campbell*. His Lordship was first called to the degree of the coif, and gave rings with the motto *Justitiam tenax*.

The following gentlemen were in this Vacation appointed Her Majesty's Counsel:—*Michael Prendergast*, Esq., of Lincoln's Inn; *Charles Sprengel Greaves*, Esq., of Lincoln's Inn; *William Charles Townsend*, Esq., of Lincoln's Inn; *Christopher Hoggins*, Esq., of the Middle Temple; *William Carpenter Rowe*, Esq., of the Inner Temple; *Thomas Colpitts Granger*, Esq., of the Inner Temple; *Peter Frederic O'Malley*, Esq., of the Middle Temple; *Barnes Peacock*, Esq., of the Inner Temple; *Edwin James*, Esq., of the Inner Temple; and *Kenneth Macaulay*, Esq., of the Inner Temple.

1850.
GROVER
v.
BURNINGHAM.

the use of his sister Sarah Elizabeth Burningham, then to the use of the first and other sons of her body, and afterwards to her daughters, in like manner as the same is hereinbefore limited to her brothers and their respective issue; and in default of all such issue of the said Sarah Elizabeth Burningham, then to the use of my own right heirs for ever." The will having set forth all the preceding limitations in full, proceeded to declare that the trustees, during the minority of the respective parties, and the parties themselves after attaining their majority, should have power of leasing the property, with power to the nephews who might be in possession to settle the same by way of jointure in case of their marriage. The will also contained a provision, that during the respective minorities of Thomas, Henry Day, and Elizabeth Burningham, in case they should be in possession, their father should receive the rents for them.

The testatrix, after thus disposing of the Westmoreland estate, proceeded in her will to dispose of her two copyhold estates of Hempstead and Cock Coms. These were disposed of in precisely similar terms, with the exception of the ultimate gift in fee, which, as respected the first of these copyholds, was devised to one Thomas Day, and in the latter to one Ralph Day, distant kinsmen of the testatrix.

With respect to the copyhold estate of Cock Coms, the testatrix devised her share therein to her sisters Elizabeth and Amy Day, for their respective lives, remainder to her great nephew Henry Day Burningham for life, with limitations (at full length) to his first and other sons and the heirs of their bodies in tail, with limitations to all the daughters, as tenants in common in tail; and in default of such issue of Henry Day Burningham, "then to the use of my kinsman Ralph Day, of Watford, in the county of Hertford, gentleman, and his heirs and assigns for ever." The testatrix then devised the Maidenhead estate to her

sisters Elizabeth and Amy for life, with remainder to Sarah and her husband for their lives, and then to Thomas Burningham, with limitations during his life to trustees to support contingent remainders, with remainder to his first and other sons and daughters, &c. (as before); and in default of such issue, to his brother Henry Day Burningham for life, with limitation in like manner to trustees, with remainder to his sons and daughters, &c., with limitations over in strict settlement to certain other collateral relations of the testatrix.

The testatrix, Joan Day, duly made and executed two codicils to the foregoing will, bearing date respectively the 29th of July, 1784, and the 26th of May, 1792. The former codicil, so far as it is material to the present question, is as follows:—

“And whereas I have, in and by my said will, in the disposition I have therein made of my share or third part of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew Thomas Burningham shall be spent, limited the same precisely in the same manner to his brother Henry Day Burningham, I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will, of and to my share or third part of the several copyhold estates holden of the respective manors of Parks and Saundridge with Walmond, in the county of Hertford, the said Thomas Burningham shall, after the limitations in favour of his brother Henry Day Burningham shall be spent, have precisely the same estate and interest therein, before the subsequent limitations to Thomas Day, of Aldersgate-street, and Ralph Day, of Watford, shall respectively take place, as the said Henry Day Burningham hath in and by my said will, in the estates in the said county of Westmoreland; and I do hereby give and devise the

1850.
 GROVER
 v.
 BURNINGHAM.

1850.
GROVER
v.
BURNINGHAM.

copyhold estate which I lately purchased of the widow Kinder, and which, after my admittance to the same, I surrendered to the use of my will, to the said Henry Day Burningham, with the like limitations over as are contained in my said will and this codicil, concerning my other copyhold estates in the said county of Hertford or elsewhere."

The other codicil did not relate to the property called Cock Coms.

The testatrix died in 1794, without having revoked her will or the said codicils. Her sisters, Elizabeth and Amy Day, survived her, and died in the lifetime of Thomas Burningham. Henry and Thomas Burningham and Ralph Day all survived the testatrix. Henry Day Burningham died in 1794, and in the lifetime of Thomas Burningham, never having married. Thomas Burningham died in 1846. The defendant Henry Burningham was the eldest son of Thomas Burningham. The estate and interest in the copyhold of Cock Coms, to which Ralph Day, his heirs or assigns, might be entitled under the preceding will and codicils, became vested in the plaintiffs.

The question for the opinion of the Court was, whether, upon the death of Thomas Burningham, the one undivided part or share in the copyhold estate of Cock Coms did, under or by virtue of the said will and codicils or any of them, pass to the said Ralph Day, his heirs or assigns; or whether, upon the death of the said Thomas Burningham, Henry Burningham, as the first son of Thomas Burningham, became entitled to any and to what estate and interest therein, by virtue of the said will and codicils or any of them.

The case was argued by

Humphry, for the plaintiffs, who cited the following authorities as to the true rule in the construction of wills:—

1 Jarman, 465; 2 Roper on Legacies, 1463; *Ferguson v. Dunbar* (a), *Harrison v. Foreman* (b), *Thornhill v. Hall* (c), *Doe d. Hearle v. Hicks* (d), *Stokes v. Heron* (e), and *Doe v. Davies* (f).

1850.
GROVER
v.
BURNINGHAM.

J. Parker, for the defendants.

POLLOCK, C. B.—In this case we shall certify to the Vice-Chancellor of England, that, in our opinion, upon the death of Thomas Burningham, one undivided third part of the copyhold estate called Cock Coms did not, by virtue of the will and codicils, pass to Ralph Day, his heirs or assigns; but that Henry Burningham, as the first son of Thomas, became entitled to an estate tail in possession therein.

In stating my own view upon the subject, I do not in the slightest degree mean to question the authorities that were cited by the learned counsel on behalf of the plaintiff. I have the greatest respect for the principle that has been frequently supported in this Court, namely, that we are to look, not so much at the intention of the testator, as at what is the legal meaning of the language he has used; and if, therefore, it is a matter of conjecture, or of matter merely of doubt and uncertainty, the true meaning of the language used must be adhered to, and that cannot be supplied which, from other circumstances, one may have a strong opinion that the testator may have meant. It is not allowable to supply language in order to carry out such supposed intention. Now, applying that rule to the present case, the question then is, whether the intention for which the defendant contends is expressed on these instruments. Now, I think I cannot convey my view of it better than by saying, that it appears to me that there are

(a) 3 Bro. C. C. 469.

(b) 5 Ves. 207.

(c) 2 C. & F. 22.

(d) 8 Bing. 475.

(e) 12 C. & F. 161.

(f) 4 M. & W. 607.

1850.
GROVER
v.
BURNINGHAM.

three steps, as put by Mr. *Parker*, which carry the logical conviction,—which do not raise a conjecture upon the subject, but which really leave no doubt whatever on the mind. The first inquiry is, as to the true meaning of the expression “limitations in favour of Thomas Burningham.” It seems to me, that there can be no doubt, from the expression “after the several limitations in favour of my great nephew shall be spent,” that it is impossible to read that in any other sense than as after the limitations in favour of *him and his issue*. The whole scope of the limitations connected with his name and his family are included in the expression “limitations in favour of him.” Then the testatrix goes on to say, that she has “limited the same precisely in the same manner to his brother Henry.” I collect from that, that when she speaks of a limitation to a person in this codicil, she means, with reference to these parties, to that person and his issue; for it is clear that the limitation to Henry has precisely the same meaning as the expression “limitation in favour of Thomas.” Then comes the next expression, “estate and interest.” Does that mean in this codicil the same thing as “limitation?” The testatrix says, that Thomas shall have precisely the same estate and interest therein as the estate and interest which Henry Day hath in and by my said will in the estates in the said county of Westmoreland. Now, looking to the will, it appears that that expression means an estate for life to himself, with a series of limitations to his issue; and it appears to me, that the testatrix most unquestionably must have meant in any view of construction, as if she had said, “as the said Henry Day Burningham hath in and by the said limitations in my said will.” I think that such an expression would have left no doubt or ground for argument whatever. Then, really is there any difference between “as Henry Day hath in and by the limitations in my will,” and “in and by my said will?” It appears to me logically to follow that the

testatrix did mean by the expression "estate and interest therein," coupled with the reference to the estate "that Henry Day hath in and by my said will," that she meant that Thomas was to take the estate with the same several limitations, and therefore, that the defendants who claim the estate in question upon such an interpretation, are the persons properly entitled to it.

1850.
 GROVER
 v.
 BURNINGHAM.

PARKE, B.—I am of the same opinion as my Lord Chief Baron in this case. I do not mean at all to throw the least doubt about the propriety of adhering to the rules that are laid down in the different cases which have been cited; and I entirely concur in the propriety of what has been said in this case by my Lord Chief Baron, of not conjecturing what the testator has intended to have done, but simply of construing the words of the will. I apprehend that a great many mistakes and difficulties have been occasioned by not sufficiently attending to the proper rule in the construction of wills,—of looking strictly to the meaning of the words used by a testator, and not to his supposed intention. We are therefore to say, what is the meaning of the words she has here used. The question in this case is, whether the context does not enable us to say that the words are not used by the testatrix according to their strict grammatical construction. I think the context does, though certainly, at the time I first addressed my attention to this case, I did not think it so clear as, on further consideration, I now do. The whole case depends upon the construction of the clause in the codicil to which the Lord Chief Baron has referred; and I think that clause enables us to see distinctly, from the recital, in what sense the words are used by the testatrix. She begins by saying, that "whereas I have, in and by my said will, in the disposition I have therein made of my share or third part in the real estates in the county of Westmoreland, after the several limitations in favour of

1850.
GROVER
v.
BURNINGHAM.

my great nephew Thomas Burningham shall be spent, limited the same precisely in the same manner to his brother Henry Day Burningham." Now I think it is perfectly clear, that by the words "several limitations in favour of my great nephew Thomas Burningham," the testatrix means limitations in favour of him and his sons and daughters; because she says, that after those are spent the estate is to go over to his brother Henry Day Burningham; but by the will it is not to go over till all the limitations in favour of the issue, as well as the limitations in favour of his brother Thomas Burningham himself, shall be spent; therefore, it seems to me perfectly clear, that by the use of the words "several limitations in favour of my great nephew," the testatrix means "several limitations in favour of my great nephew, his sons and daughters." What is the meaning of the word limitations? It implies gifts of estates to him and to his sons and daughters, and gifts of powers. Then, in the next place she says, in like manner the same is to go to his brother Henry Day Burningham. There is no question that, "to his brother," coupled with the words "precisely in the same manner," gives the estates to Henry Day Burningham and all his issue; and that is what she means by the use of these terms, namely, that they are to go over to Henry Day Burningham and his issue, precisely in the same way; so that the words "his brother Henry Day Burningham" mean Henry Day Burningham and his issue. Then follows the dispositive part of the codicil; and the question is, what is its true meaning:—"And I further declare my mind and will to be, that, in the next disposition made in my said will of and to my share or third part of the several copyhold estates holden of the respective manors of Parks and Saundridge with Walmond, in the county of Hertford, the said Thomas Burningham shall, after the limitations in favour of his brother Henry, "have a certain estate." That is clearly the limitations to the said Henry Day, in the

sense in which she has declared she understands those words before; that is, after the gifts of the several estates to him and his issue in the will; so that the estates to Thomas would not come in until after the estate to Henry Day and his issue were all spent. Then what estate is Thomas to take? He is to take precisely the same estate and interest before the subsequent limitations to Thomas Day, of Aldersgate-street, and Ralph Day, of Watford, shall respectively take place, as the said Henry Day Burningham. Now the sole question in this case is, whether the words "estate and interest" are to be read in the same sense as the word "limitations." If you consider the word "limitations" as a gift of estate and interest to him and his children, the words "estate and interest" must, I think, be read in the same sense; and therefore, the estate does not go over to Thomas Day, of Aldersgate-street, and Ralph Day, of Watford, until the estates and interest given to Thomas Burningham and his children are both exhausted. It seems to me, therefore, on looking at this clause, that the testatrix has enabled us by the context to judge in what sense the words are used, and that they are not used in their strict grammatical sense. I own I think, that, on considering the will itself, and this clause in the will also, in connection with the observations made by Mr. *Parker* as to the probable intent of the testatrix, looking only to the rule of construction, and the words used in the instrument itself, the intention of the testatrix is abundantly clear. I think, therefore, that our certificate to the Vice Chancellor must be in favour of the defendants.

1850.
 GROVER
 v.
 BURNINGHAM.

ROLFE, B.—I am entirely of the same opinion; and in no part of the judgment of the Court do I more entirely concur than in the observation, that our decision in this case must not be taken as trenching in the slightest degree on that canon of construction by which we are called upon only to interpret the language we have before us. We are

Exchequer Reports.

EASTER TERM, 13 VICT.

1850.

April 24.

SYBILLA GROVER, HENRY MONTAGUE GROVER, Clerk, and
CHARLES EHRET GROVER, v. HENRY BURNINGHAM and
THOMAS NEVILLE AB DY.

THIS was a case sent by the Vice-Chancellor of England for the opinion of this Court.

J. D. at the time of making her will was entitled to two freehold estates, one in the county of Westmoreland, and the other in the county of Berks, and also two copyhold estates,

The case stated in substance, that Joan Day, at the time of making her will hereinafter mentioned, and up to the time of her decease, was seised of and entitled to, as tenant in common, one equal undivided third part of certain freehold lands and hereditaments in the county of West-

one called Hempstead, and the other Cock Coms. In 1778, J. D. made her will, and devised her freehold estate, after certain life estates, to her great nephew T. B. for life, then to his issue for their respective lives, remainder to his brother H. B. for life, then to his issue for their respective lives, and then to S. E. for life and her issue, remainder to the right heirs of the testatrix. She devised the copyhold estate of Hempstead, after certain life estates, to H. B. for life, remainder to his issue, remainder to T. D., and the copyhold estate of Cock Coms, after the same life estate, to H. D. for life, remainder to his issue, remainder to H. D. The freehold estate, in the county of Berks, the testatrix devised, after certain life estates, to T. D., remainder to his issue for their respective lives, remainder to his brother H. D. and his issue in like manner, remainder to S. E. for life and her issue, and then, with limitations over in strict settlement, to certain collateral relations of the testatrix. In 1784, the testatrix made the following codicil: "And whereas I have in and by my said will, in the disposition I have therein made of my share of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew T. B. shall be spent, limited the same precisely in the same manner to his brother H. D. B., I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will of and to my share of the several copyhold estates of Cock Coms, &c., the said T. B. shall, after the limitations in favour of his brother H. D. B. shall be spent, have precisely the same estate and interest therein before the subsequent limitations to T. D. and R. D. shall respectively take place as the said H. D. B. shall in and by my said will in the estates in the said county of Westmoreland; and I do hereby give and devise the copyhold estate which I lately purchased of the widow K., and which, after my admittance to the same, I surrendered to the use of my will, to the said H. D. B., with the like limitations over as are contained in my said will and this codicil, concerning my other copyhold estates in the said county of Hertford or elsewhere:"—*Held*, that, according to the true construction of this codicil and will, the copyhold estate of Cock Coms was devised to T. B. and his issue for life.

moreland, and of a certain freehold messuage, &c. at Maidenhead, in the county of Berks, and was at the time of the making of the surrenders hereinafter mentioned, and up to the time of her decease, entitled as tenant in common to one equal undivided third part of certain copyhold lands and hereditaments, held of the manor of Parks, in the county of Hertford; and also a copyhold estate called Cock Coms, held of the manor of Saundridge with Walmond in that county, and of the inheritance of the said third part of all those copyhold hereditaments in possession to her and her heirs, according to the custom of the respective manors, of which the same were respectively holden.

1850.
GROVER
v.
BURNINGHAM.

In May, 1776, Joan Day surrendered these copyholds to the uses of her will. On the 3rd of August, 1778, she duly made and executed her will, by which she devised her Westmoreland estate to her two sisters Elizabeth and Amy Day for their respective lives, with remainder to her sister Sarah, the wife of John Lane, and to John the husband of the said Sarah for their respective lives, with remainder to her great nephew Thomas Burningham for his life (with a limitation, in the usual form, to support contingent remainders), with remainder to the first and other sons of the said Thomas Burningham, successively in tail general, with remainder to the daughters of the said Thomas Burningham, as tenant in common in tail; "and in default of all such issue of the said Thomas Burningham, then to the use of his brother Henry Day Burningham in like manner, for his life, with like remainder to my said trustees, to preserve contingent remainders; and from and after the decease of the said Henry Day Burningham, then to the use of the first and other sons of his body, and afterwards to his daughters, in like manner as the same is hereinbefore limited to his brother Thomas Burningham and his issue; and in default of all such issue of the said Henry Day Burningham, then to

1850.
GROVER
v.
BURNINGHAM.

the use of his sister Sarah Elizabeth Burningham, then to the use of the first and other sons of her body, and afterwards to her daughters, in like manner as the same is hereinbefore limited to her brothers and their respective issue; and in default of all such issue of the said Sarah Elizabeth Burningham, then to the use of my own right heirs for ever." The will having set forth all the preceding limitations in full, proceeded to declare that the trustees, during the minority of the respective parties, and the parties themselves after attaining their majority, should have power of leasing the property, with power to the nephews who might be in possession to settle the same by way of jointure in case of their marriage. The will also contained a provision, that during the respective minorities of Thomas, Henry Day, and Elizabeth Burningham, in case they should be in possession, their father should receive the rents for them.

The testatrix, after thus disposing of the Westmoreland estate, proceeded in her will to dispose of her two copyhold estates of Hempstead and Cock Coms. These were disposed of in precisely similar terms, with the exception of the ultimate gift in fee, which, as respected the first of these copyholds, was devised to one Thomas Day, and in the latter to one Ralph Day, distant kinsmen of the testatrix.

With respect to the copyhold estate of Cock Coms, the testatrix devised her share therein to her sisters Elizabeth and Amy Day, for their respective lives, remainder to her great nephew Henry Day Burningham for life, with limitations (at full length) to his first and other sons and the heirs of their bodies in tail, with limitations to all the daughters, as tenants in common in tail; and in default of such issue of Henry Day Burningham, "then to the use of my kinsman Ralph Day, of Watford, in the county of Hertford, gentleman, and his heirs and assigns for ever." The testatrix then devised the Maidenhead estate to her

sisters Elizabeth and Amy for life, with remainder to Sarah and her husband for their lives, and then to Thomas Burningham, with limitations during his life to trustees to support contingent remainders, with remainder to his first and other sons and daughters, &c. (as before); and in default of such issue, to his brother Henry Day Burningham for life, with limitation in like manner to trustees, with remainder to his sons and daughters, &c., with limitations over in strict settlement to certain other collateral relations of the testatrix.

The testatrix, Joan Day, duly made and executed two codicils to the foregoing will, bearing date respectively the 29th of July, 1784, and the 26th of May, 1792. The former codicil, so far as it is material to the present question, is as follows:—

“And whereas I have, in and by my said will, in the disposition I have therein made of my share or third part of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew Thomas Burningham shall be spent, limited the same precisely in the same manner to his brother Henry Day Burningham, I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will, of and to my share or third part of the several copyhold estates holden of the respective manors of Parks and Saundridge with Walmond, in the county of Hertford, the said Thomas Burningham shall, after the limitations in favour of his brother Henry Day Burningham shall be spent, have precisely the same estate and interest therein, before the subsequent limitations to Thomas Day, of Aldersgate-street, and Ralph Day, of Watford, shall respectively take place, as the said Henry Day Burningham hath in and by my said will, in the estates in the said county of Westmoreland; and I do hereby give and devise the

1860.
 GROVER
 v.
 BURNINGHAM.

1850.
GROVER
v.
BURNINGHAM.

the use of his sister Sarah Elizabeth Burningham, then to the use of the first and other sons of her body, and afterwards to her daughters, in like manner as the same is hereinbefore limited to her brothers and their respective issue; and in default of all such issue of the said Sarah Elizabeth Burningham, then to the use of my own right heirs for ever." The will having set forth all the preceding limitations in full, proceeded to declare that the trustees, during the minority of the respective parties, and the parties themselves after attaining their majority, should have power of leasing the property, with power to the nephews who might be in possession to settle the same by way of jointure in case of their marriage. The will also contained a provision, that during the respective minorities of Thomas, Henry Day, and Elizabeth Burningham, in case they should be in possession, their father should receive the rents for them.

The testatrix, after thus disposing of the Westmoreland estate, proceeded in her will to dispose of her two copyhold estates of Hempstead and Cock Coms. These were disposed of in precisely similar terms, with the exception of the ultimate gift in fee, which, as respected the first of these copyholds, was devised to one Thomas Day, and in the latter to one Ralph Day, distant kinsmen of the testatrix.

With respect to the copyhold estate of Cock Coms, the testatrix devised her share therein to her sisters Elizabeth and Amy Day, for their respective lives, remainder to her great nephew Henry Day Burningham for life, with limitations (at full length) to his first and other sons and the heirs of their bodies in tail, with limitations to all the daughters, as tenants in common in tail; and in default of such issue of Henry Day Burningham, "then to the use of my kinsman Ralph Day, of Watford, in the county of Hertford, gentleman, and his heirs and assigns for ever." The testatrix then devised the Maidenhead estate to her

sisters Elizabeth and Amy for life, with remainder to Sarah and her husband for their lives, and then to Thomas Burningham, with limitations during his life to trustees to support contingent remainders, with remainder to his first and other sons and daughters, &c. (as before); and in default of such issue, to his brother Henry Day Burningham for life, with limitation in like manner to trustees, with remainder to his sons and daughters, &c., with limitations over in strict settlement to certain other collateral relations of the testatrix.

The testatrix, Joan Day, duly made and executed two codicils to the foregoing will, bearing date respectively the 29th of July, 1784, and the 26th of May, 1792. The former codicil, so far as it is material to the present question, is as follows:—

“And whereas I have, in and by my said will, in the disposition I have therein made of my share or third part of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew Thomas Burningham shall be spent, limited the same precisely in the same manner to his brother Henry Day Burningham, I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will, of and to my share or third part of the several copyhold estates holden of the respective manors of Parks and Saundridge with Walmond, in the county of Hertford, the said Thomas Burningham shall, after the limitations in favour of his brother Henry Day Burningham shall be spent, have precisely the same estate and interest therein, before the subsequent limitations to Thomas Day, of Aldersgate-street, and Ralph Day, of Watford, shall respectively take place, as the said Henry Day Burningham hath in and by my said will, in the estates in the said county of Westmoreland; and I do hereby give and devise the

1860.
 GROVER
 v.
 BURNINGHAM.

1850.
GROVER
v.
BURNINGHAM.

copyhold estate which I lately purchased of the widow Kinder, and which, after my admittance to the same, I surrendered to the use of my will, to the said Henry Day Burningham, with the like limitations over as are contained in my said will and this codicil, concerning my other copyhold estates in the said county of Hertford or elsewhere."

The other codicil did not relate to the property called Cock Coms.

The testatrix died in 1794, without having revoked her will or the said codicils. Her sisters, Elizabeth and Amy Day, survived her, and died in the lifetime of Thomas Burningham. Henry and Thomas Burningham and Ralph Day all survived the testatrix. Henry Day Burningham died in 1794, and in the lifetime of Thomas Burningham, never having married. Thomas Burningham died in 1846. The defendant Henry Burningham was the eldest son of Thomas Burningham. The estate and interest in the copyhold of Cock Coms, to which Ralph Day, his heirs or assigns, might be entitled under the preceding will and codicils, became vested in the plaintiffs.

The question for the opinion of the Court was, whether, upon the death of Thomas Burningham, the one undivided part or share in the copyhold estate of Cock Coms did, under or by virtue of the said will and codicils or any of them, pass to the said Ralph Day, his heirs or assigns; or whether, upon the death of the said Thomas Burningham, Henry Burningham, as the first son of Thomas Burningham, became entitled to any and to what estate and interest therein, by virtue of the said will and codicils or any of them.

The case was argued by

Humphry, for the plaintiffs, who cited the following authorities as to the true rule in the construction of wills:—

1 Jarman, 465; 2 Roper on Legacies, 1463; *Ferguson v. Dunbar* (a), *Harrison v. Foreman* (b), *Thornhill v. Hall* (c), *Doe d. Hearle v. Hicks* (d), *Stokes v. Heron* (e), and *Doe v. Davies* (f).

1850.
 GROVER
 v.
 BURNINGHAM.

J. Parker, for the defendants.

POLLOCK, C. B.—In this case we shall certify to the Vice-Chancellor of England, that, in our opinion, upon the death of Thomas Burningham, one undivided third part of the copyhold estate called Cock Coms did not, by virtue of the will and codicils, pass to Ralph Day, his heirs or assigns; but that Henry Burningham, as the first son of Thomas, became entitled to an estate tail in possession therein.

In stating my own view upon the subject, I do not in the slightest degree mean to question the authorities that were cited by the learned counsel on behalf of the plaintiff. I have the greatest respect for the principle that has been frequently supported in this Court, namely, that we are to look, not so much at the intention of the testator, as at what is the legal meaning of the language he has used; and if, therefore, it is a matter of conjecture, or of matter merely of doubt and uncertainty, the true meaning of the language used must be adhered to, and that cannot be supplied which, from other circumstances, one may have a strong opinion that the testator may have meant. It is not allowable to supply language in order to carry out such supposed intention. Now, applying that rule to the present case, the question then is, whether the intention for which the defendant contends is expressed on these instruments. Now, I think I cannot convey my view of it better than by saying, that it appears to me that there are

- (a) 3 Bro. C. C. 469.
- (b) 5 Ves. 207.
- (c) 2 C. & F. 22.

- (d) 8 Bing. 475.
- (e) 12 C. & F. 161.
- (f) 4 M. & W. 607.

1850.
CORLETT
v.
BOOKER.

The pleader selects the former as the time, and the plea avers, that when the agreement was made, (not afterwards,) they were the holders; and the replication denies that material fact, and properly, for if that was untrue the whole plea fails. The pleader might have relied on their being holders subsequently, but he has not done so.

Mr. *Peacock*, however, argues, that the replication, by not traversing the averment that Macdowall & Sons delivered the bills to the plaintiff after the agreement, and with notice of the premises, admits those facts, and that they constitute an answer to the plaintiff's case. But that is a fallacy; though the replication admits a delivery after the agreement, it does not admit any legal title in Macdowall & Sons as holders then.

The word "delivered" does not import that they subsequently acquired a title to the bills, to enable them to make a good title to another by delivery; it means no more than simple delivery, which is quite immaterial if they had not then acquired a new title to the bills. And the admission of notice of the premises, by the absence of a traverse of that fact, is unimportant. The allegation is surplusage, if the bills were indorsed after they became due, and is wholly immaterial besides; for if the fact did not exist of an agreement made when Macdowall & Sons were holders of the bills, notice of a non-existing fact is quite idle and unimportant.

Rule refused.

1850.

LUSH v. RUSSELL.

May 8.

ASSUMPSIT.—The declaration, after stating that the defendant carried on the business of a baker at Bristol, and had hired the plaintiff as his servant for the period of four years, alleged as a breach, “that the defendant did not nor would, although he the defendant hath never, during the said part of the said term during which the plaintiff so remained and continued in his the defendant’s service as aforesaid, ceased to carry on the said business of a baker, but during such last-mentioned time carried on and still does carry on the same in the said city of Bristol as aforesaid, continue him the plaintiff in his the defendant’s said employ for the said term of four years, to be computed from the day and year first aforesaid, but on the contrary thereof, during the said term of four years, and before the expiration thereof, to wit, &c., refused to suffer the plaintiff to continue in his the defendant’s said employ for the remainder of the said term of four years, and then wrongfully dismissed and discharged the plaintiff therefrom *without any reasonable or probable cause whatsoever*, and hath thence hitherto wholly neglected and refused, and still doth neglect and refuse, to continue the plaintiff in his the defendant’s said employ for the remainder of the said term or any part thereof.”

The defendant pleaded, “that, after the making of the promise and agreement, and before and at the time of the dismissal and discharge of the plaintiff by the defendant, to wit, &c., he the said plaintiff conducted himself in an improper, offensive, and disobedient and insolent manner, and was guilty of habitual negligence and carelessness in and about his said capacity and duty of a journeyman

In an action of assumpsit brought by the plaintiff, a servant, for dismissing him during the period for which he was hired, the declaration stated that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom. Plea, that, after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself in an improper and disobedient manner, and disobeyed the defendant’s lawful orders; *without this*, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause; concluding to the country. Issue thereon:—*Held*, that, although the plea might be bad on special demurrer, as putting in issue an immaterial

allegation in the declaration, yet, as issue had been taken on the plea, the plaintiff’s misconduct, as well as the fact of his dismissal, were in issue, and consequently that evidence of such misconduct offered at the trial by the defendant was improperly rejected, and that the onus of such proof lay on the defendant.

1850.
 LUSH
 v.
 RUSSELL.

baker, insomuch that the defendant was forced and obliged to dismiss and discharge the plaintiff, and could not longer keep him in his the defendant's service, and the defendant was forced and obliged by such conduct of the plaintiff to put an end to such service and employ; *without this*, that the defendant then wrongfully dismissed and discharged the plaintiff therefrom without any reasonable or probable cause whatsoever," modo et formâ; concluding to the country. Upon which plea issue was joined.

At the trial, before *Cresswell*, J., at the last Summer Assizes at Bristol, the defendant's counsel admitted the dismissal, but offered evidence to shew that the plaintiff had so misconducted himself, as to justify his dismissal by the defendant. The learned Judge refused to receive this evidence, being of opinion that the only question raised by the plea was the mere fact of dismissal.

A rule for a new trial having been obtained, on the ground of misdirection, in last Hilary Vacation (Feb. 13),

Butt shewed cause.—The direction of the learned Judge was correct. The case of *Powell v. Bradbury* (a), to which reference was made at the trial, is strictly in point. That was an action for the wrongful dismissal of the plaintiff, who was the defendants' servant; and the defendants pleaded, secondly, that they did not wrongfully, without reasonable or probable cause, dismiss or discharge the plaintiff from the employ of the defendants, modo et formâ; and *Maule*, J., in delivering the opinion of the Court, says, "The Court is agreed on one question, namely, that the second plea puts in issue nothing except the fact of dismissal."—The Court then called upon

Peacock, in support of the rule.—This question, which appears to have arisen and to have been argued in the case relied upon, was not material to the decision there,

(a) 18 L. J., C. P., 116.

and the judgment of the Court was not founded upon it. The plea in that case was a general traverse. The present plea distinctly raises the question, whether or not the plaintiff was discharged for reasonable cause. An objection might have been raised to the plea, on special demurrer, that it ought to have been in confession and avoidance, and that it ought to have set out affirmatively what the dismissal was. Even assuming that the allegation which the plaintiff contends to have been in issue at the trial, was altogether immaterial before plea, the defendant has made it material by this form of pleading. A traverse cannot be properly taken on an immaterial point, or one which is prematurely alleged (a); but if the defendant please to take upon himself to traverse such an allegation, he puts it in issue. The declaration would no doubt be good without the allegation: *Sir Ralph Bovy's case* (b). [*Parke*, B.—One question here is, whether the inducement in this plea varies it from the case of *Powell v. Bradbury*. In *Frankum v. Lord Falmouth* (c), which was an action for the diversion of a watercourse, it was held, that the plea of not guilty did not put in issue the wrongfulness of the act.] Here the inducement distinguishes this case from *Powell v. Bradbury*. The plaintiff might have traversed the inducement.

1850.
 LUSH
 v.
 RUSSELL.

Butt was again heard in support of the direction.—The plea merely traverses and puts in issue the material words in the allegation, to which it is directed. The substance of the issue alone need be proved. The plaintiff adopted the only course that was open to him, by joining issue. He could not traverse the inducement. There is no authority to shew that the inducement to a special traverse alters the effect of the traverse. In *Palmer v. Gooden* (d), *Tindal*, C. J., in delivering the judgment of the Court of

(a) *Stephen on Pleading*, p. 275,
 5th edit.

(b) 1 Vent. 217.

(c) 2 A. & E. 452.

(d) 8 M. & W. 890.

1850.
 LUSH
 v.
 RUSSELL.

error, said, "But a party does not make an issue upon the substantial matter to be tried by the jury bad, merely because he includes in it something of total surplusage and immateriality." [He also referred to *Bac. Abr. tit. "Pleas and Pleading,"* (K 2); *Spilsbury v. Micklethwaite*(a); and *Co. Litt. 483.*, to shew the effect of the terms "modo et formâ."]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKER, B.—In this case, which was tried before my Brother *Cresswell*, at Bristol, a rule nisi was granted on the ground of misdirection, and cause shewn at the late sittings after term.

It was an action brought by the plaintiff, a servant, for dismissing him during the period for which he was hired, viz. four years; and the plaintiff in his declaration alleged, that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom without any reasonable cause.

The defendant pleaded, that, after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself in an improper and disobedient manner, and disobeyed the defendant's lawful orders; without this, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause, and concluded to the country. .

On the trial, the defendant having admitted the dismissal, proposed to shew that the plaintiff had misconducted himself so as to justify the discharge; but the learned Judge refused to receive the evidence, and directed a verdict for the plaintiff, being of opinion that the plea put in issue the dismissal only. We are to decide whether that direction was right, and we are of opinion

(a) 1 Taunt. 146.

that it was not. The question is not, whether the plea would have been bad on demurrer, for putting in issue an immaterial allegation, but how the issue raised was to be disposed of at the trial.

There is no doubt that the plaintiff might have omitted the allegation that the defendant dismissed him "without reasonable cause," and that the averment of his having done so, was, in the declaration, immaterial and surplusage, and ought not to have been put in issue; and that the plea, in form at least, throws the burden of the proof of the want of reasonable cause on the plaintiff, which the defendant, on proper pleadings, ought to have borne; and on these grounds, the plea is clearly demurrable; but, it not having been demurred to, the matters which it *does put in issue*, though immaterial in that stage, and improperly put in issue, must be disposed of by the jury, under the direction of the Judge. For example, if the plea were to put in issue matter of aggravation unnecessarily stated, and only that—as the conversion of goods in an action of trespass for taking them, the death of cattle in the same form of action for driving them—though the plea would be unquestionably bad, the verdict must be taken one way or the other upon the issue on the trial. In like manner, it must, if the plea put in issue that *and another* and material fact, the only question being, *whether it is put in issue*. Now, it is certain that if the form of the traverse is such that the material may be separated from the immaterial averments, the material need only be proved on the trial. Such is the case where there is a plea which is a general denial only, as not guilty in trespass, or case, where immaterial matter or matter in aggravation was stated; such would be the case in non assumpsit, under the old system, on such a declaration as the present; and such would have been the case if the defendant had traversed the allegation of dismissal in the general form, "that he did not dismiss the plaintiff, modo ac formâ;" then the

1850.

LUSH
v.
RUSSELL

1850.
 LUSH
 v.
 RUSSELL.

dismissal only, the material part, would have been in issue.

Littleton, in sect. 483, is as follows:—"To this it may be said, that these words (*modo ac formâ prout, &c.*) in many cases are words of form of pleading, and not words of substance. For, if a man bring a writ of entry in *casu proviso*, of the alienation made by the tenant in dower to his disinheritance, and counteth of the alienation made *in fee*, and the tenant saith that he did not alien in manner as the demandant hath declared, and upon this they are at issue; and it is found by verdict that the tenant aliened in tail or for term of another man's life, the demandant shall recover; yet the alienation was not in manner as the demandant hath declared," &c. An explanation is given in F. N. B. 206 (G):—"The writ in *casu proviso* supposeth the alienation to be made in fee, although it be but for life or in tail, for that there is *no other form*;" and it "is not material, for if it be in fee, or in tail, or for life, it is a forfeiture of the estate." Again, in the case of *Pope v. Skinner* (a), where, in replevin, the defendant avowed for damage feasant in the month of April, and the plaintiff replied, that one Williams was seised in fee and had a right of common, and demised the land to him for a year *from* the Lady-day before, and on a traverse "*non demisit modo ac formâ*, the lease appeared to begin on Lady-day; it was held, that the substance of the issue was, whether the lease covered the time of the trespass, which it would do; whether it commenced on the 25th or 26th of March; and the *modo ac formâ* was immaterial.

From the report, however, it seems that the verdict was special, stating the facts; and it is said, that the jury might have found against the plaintiff, and could not safely have found a general verdict for him.

(a) Hob. 72.

A distinction is taken in Co. Litt. 281. b., in the Commentary to the above section, between the effect of the words "modo ac formâ," when the issue is on the point of the writ or action, and where it is on a *collateral* point; in the former case they are matter of form, in the latter material. That the issue was on the point of the writ or action, in the case put in Littleton, is abundantly clear. Whether it is so in this case, or within the meaning of that rule, it is unnecessary to decide; for, assuming the words "modo ac formâ" to be quite immaterial, it will make no difference, as will appear. Again, if there be a plea of justification which contains material and immaterial matter, the replication *de injuriâ absque tali causâ* would put in issue the material matter only: *Spilsbury v. Micklethwaite* (a), *Davis v. Chapman* (b). But if the traverse, instead of being in a general form, puts in issue the immaterial part in *express terms*, that must be disposed of by the jury, and, generally speaking, according to the terms of the issue. The objection to such a plea on demurrer is, that if issue were taken on it, it would oblige the plaintiff to prove what but for the form of the issue he need not have proved. This is the general character of the objection that a traverse is too large—see the case of *Gorham v. Sweeting* (c), where it is very correctly said in the note of the learned editor, "It shall not be permitted to a defendant, by expressly traversing any allegation in the declaration by a formal traverse, to compel the plaintiff to prove more than he would be bound to do if the defendant had pleaded the general issue only to the declaration."

Now, there cannot be any doubt that this form of a traverse does in express terms deny the want of reasonable cause; and therefore, that question must be disposed of by the jury. Whether it throws the burden of proof on

1850.
LUSH
v.
RUSSELL.

(a) 1 Taunt. 146.

(b) 2 M. & G. 921.

(c) 2 Wms. Saund. 207 a, n.

24, 6th edit.

1850.
 LUSH
 v.
 RUSSELL.

the wrong party is immaterial in the present inquiry; if it does, it is an additional reason for demurring to it: but it nevertheless puts in issue the want of reasonable cause, however informally. We think, however, that on the trial of the issue the onus probandi would be on the defendant, on the ground that he had the *affirmative* of the proposition to maintain, and that the defendant ought to justify the act of dismissal, which is *prima facie* a breach of covenant.

Upon reference to the authorities and cases cited on the argument, there is none that is at variance with the rule, that if the traverse be general in its terms, it does not involve matter which need not have been pleaded, and that, if it is special, denying that matter *expressly*, it does, except the case of *Powell v. Bradbury* (18 L. J.), on the authority of which, no doubt the learned Judge proceeded.

In the present case there is an inducement which leaves no doubt as to the intention of the pleader in the traverse; which there was not in that; but we do not think we ought to rely upon that distinction.

We cannot ascertain, from the short report of the case of *Powell v. Bradbury*, in the Law Journal, whether the question of what was in issue on such a traverse, on which the opinion of the Court appears to have been declared, was material to the decision of the case, or extrajudicial; in the report of the same case, in 7 Com. Bench Reports (a), just published, it does. Be this as it may, it does distinctly appear that the opinion was founded on the authority of the case of *Frankum v. The Earl of Falmouth* (b), which we think inapplicable, as the question there arose on the issue on a plea of not guilty, and it was rightly held, that although there was an averment in the declaration, that the defendant *wrongfully* diverted a watercourse, the wrongful nature of the act was not in issue. It was not the case of an express traverse. Matter of aggravation would not have been in issue on not guilty, and yet, *if expressly put in issue*, it must have been proved. So, unnecessary matter, as an

(a) Page 201.

(b) 2 A. & E. 452.

avermment of the defendant being of full age when he executed a bond, if the plea had stated (admitting the execution of the bond) that he was not then of full age, that question would have been in issue, and equally so if the issue was such (whether informal or not, in that respect, is of no consequence) as to put both facts, the execution of the bond and the majority, in issue.

1850.
LUSH
v.
RUSSELL.

The case of *Palmer v. Gooden*(a), which was the other case cited for the plaintiff, does not decide the question as to what should be proved on an issue involving immaterial matter of the description which this does. A satisfactory reason for that judgment is, that a traverse is not bad which involves what is not merely immaterial but impossible, and therefore incapable of being proved at all, as a traverse of an entry on and an expulsion from an incorporeal hereditament, viz. tolls. Lord Chief Justice *Tindal* says, indeed, that an issue upon the substantial matter to be tried by the jury, is not bad merely because it includes in it something of total surplusage and immateriality. But that is not the case here; for the allegation of the want of reasonable cause need not have been made by the plaintiff, and is surplusage in that sense; yet, being expressly, though informally, put in issue, it is not totally immaterial, but the contrary.

There are, however, other cases not cited on the argument to which it is necessary to advert, which are authorities that where an immaterial circumstance was traversed expressly, it need not be proved. One is the case of *Carvick v. Blagrove*(b), an action by the assignees of a leasehold reversion. The declaration stated, that the lessor, at the time of the lease, was lawfully possessed of certain premises, that is to say, for the remainder of a term of twenty-two years, commencing the 25th of December, 1797, and made the lease, and then the plaintiff derived title by assignment from the lessor, and alleged

(a) 8 M. & W. 890.

(b) 1 B. & B. 531.

1850.
 LUSH
 v.
 RUSSELL.

breaches. The defendant pleaded, that the lessor was not, at the time of the lease, possessed for the residue and remainder of the said supposed term of twenty-two years, modo ac formâ, &c., and there was a general demurrer. The Court held, and very properly, that the allegation was traversable, and did not amount to nil habuit in tenementis, and gave two answers to the second objection, that the plea put in issue the precise term of the lease, and that the plaintiff's case would be defeated if it appeared that the term was not of the precise extent alleged. The first of these answers was, that if such was the consequence of the too great particularity of the allegation, it was the plaintiff's own fault. The second was, that such consequence would not follow, because the plea put in issue the substance of the allegation only, and the substance was that the lessor was possessed of a term and made a derivative one; and the two authorities of Litt., sect. 483, and *Pope v. Skinner*, above cited, are referred to as proving that, on the traverse of an allegation, the words "modo acformâ" are, in many cases, not words of substance.

The first of these two reasons is satisfactory, and falls within the authority of a class of cases which hold, that, if a party allege a precise estate, or make a precise allegation which he was not bound to do, yet, if it be material and bear on the question, he gives the other side the advantage of traversing it: see 2 Wms. Saund. 207 b, 6th edit.; Dyer, 365 a, pl. 32; Yelv. 195; and *Smith v. Dixon* (a). The plaintiff need not have stated the precise term, if he had alleged it to be such as to warrant the underlease—as if he had stated that he was possessed of the tenement for a certain term of years, whereof more than the number of years in the underlease were then to come and unexpired; but, having stated the precise term, and in no other way shewn that it warranted that underlease and created a chattel reversion, he enables the defendant to traverse the precise term.

(a) 7 A. & E. 1.

But the second reason given by the Lord Chief Justice *Dallas* is not satisfactory, for both the authorities cited (Litt. sect. 483, and *Pope v. Skinner*), are cases where the traverse is in the general form "non alienavit modo ac formâ," "non demisit modo ac formâ," which only puts in issue the material part, as has been above stated; whereas the traverse in that case was expressly of the precise term of twenty-two years.

Another case is that of *Barber v. Lemon*(a). There the plea having stated that the bill of exchange declared upon had been indorsed over by the plaintiff, before the commencement of the suit, to a third person, who then became and *thence afterwards*, to wit, *thence hitherto*, remained the holder, and the replication stated that, at the time of the commencement of the suit, the plaintiff was the holder, without this, that the third person from the time of the indorsement hitherto remained the holder thereof "modo ac formâ," the replication was held not to be bad on special demurrer, as being too large and putting in issue immaterial matter, viz. the title to the bill after the commencement of the suit and up to the time of plea pleaded. The difficulty arose from the introduction of the term "hitherto" into the traverse, without which there would have been no question; but the Court held, that the traverse put in issue the title of the third person at the time of the commencement of the suit, as it certainly did; and that was the only material part, as the plaintiff could not recover if that was proved; and the finding on the averment as to the time subsequent was quite immaterial; and that averment was total surplusage and immateriality within the meaning of the rule laid down by Lord Chief Justice *Tindal*. But, in this case, the question, whether there was reasonable cause of dismissal, was a material matter, though alleged out of its proper place, and though the issue was improper.

1850.
LUSH
v.
RUSSELL.

Rule absolute.

(a) 11 Q. B. 302.

1850.

April 26.

GOULD v. THE STAFFORDSHIRE POTTERIES WATERWORKS COMPANY.

Under the 34th section of the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18, which provides that all the costs of arbitration on the amount of compensation to be given for lands required to be taken by a public Company are to be settled by the arbitrators, such costs need not be incorporated in the award, but may be ascertained at a subsequent time by the persons who made the award.

Such adjudication of the costs need not be within three months after the time of the reference.

The term "the arbitrators" in that section may mean either the arbitrators or umpire, according as the compensation shall have been determined by the arbitrators or umpire.

In an action for the recovery of compensation awarded

and the costs, the declaration stated that the umpire was required by the plaintiff to settle and determine the costs to be paid to him under that Act:—*Held*, on special demurrer, that the averment amounted to a statement that the umpire was required to adjudicate upon the costs, and was sufficient.

DEBT.—The declaration, after reciting, that before the passing of the Act of Parliament whereby the defendants were incorporated, i.e. The Staffordshire Potteries Waterworks Act, 1847, to wit, on &c., the plaintiff was, and hitherto hath been and still is, seised of certain lands, situate, to wit, at &c., in the county of Stafford, distinguished as &c., in a certain plan and book of reference which, prior to the application for the said Act of incorporation, to wit, on &c., was and still is deposited in the office of the clerk of the peace for the said county of Stafford, and which said book of reference then and still contains the name of the plaintiff as owner of the said lands; and that the defendants, after the making of the said Act, to wit, on &c., by virtue of the authority thereof, determined upon taking a part of the said lands, and an easement over other parts of the said lands, for the purposes of the said undertaking; and thereupon, to wit, on &c., by virtue of the said Act and the Lands Clauses Consolidation Act, 1845, incorporated therewith, by writing, &c., to wit, on &c., gave notice to the plaintiff that the defendants required to purchase and take for their purposes the said land particularly described in the said notice and on a plan thereto annexed, and the said easement, which was also therein particularly described; and that they were willing to treat with the plaintiff for the purchase of the same from him, and as to the compensation to be made to him for any damage that might be sustained by him by reason of the execution of certain works then about to be undertaken and done by them, by virtue of the said last-mentioned Act." The

declaration, after averring that the defendants were then duly authorised and empowered by the statute to purchase and take the land, &c., proceeded to recite, that whereas the defendants, &c., to wit, on &c., offered to the plaintiff a certain sum, to wit, the sum of 359*l.* 3*s.* 11½*d.*, for the purchase of the fee simple of the said land and the said easement, and for the damages to be sustained by the plaintiff by the execution of the said works and undertaking, and no further and greater sum was ever at any time offered by the defendants to the plaintiff for the purchase thereof, or for the said damages. And after reciting that no agreement was come to between the defendants and the plaintiff as to the amount of compensation to be paid by the defendants for the interest of the plaintiff in the said lands and the said easement, or for the damage to be sustained by him as aforesaid; and the compensation then claimed by him from the defendants then far exceeded the sum of 50*l.*, to wit, &c., and the plaintiff was then desirous of having the same settled by arbitration, under the Lands Clauses Consolidation Act; and thereupon the plaintiff, to wit, on the 26th of August, 1848, and before the defendants had issued any warrant to the plaintiff to summon a jury in respect of the said lands and easement, &c., signified such his desire by notice in writing to the defendants, &c.; and thereupon afterwards, to wit, on &c., the defendants, in pursuance of the statute, that is to say, by a notice signed by two of the directors of the said Company, to wit, &c., duly nominated and appointed one J. Leach, of &c., to be an arbitrator, to settle and determine, in conjunction with an arbitrator to be appointed by the plaintiff, the amount of purchase-money and compensation to be paid by the defendants for the purchase and taking the said part of the said lands and the said easement; and afterwards, on &c., the plaintiff, to wit, in pursuance of the said Lands Clauses Consolidation Act, by writing, &c., bearing date, &c., duly nominated and appointed one T. Heaton, of &c., to be one of the arbitra-

1850.
 GOULD
 v.
 STAFFORD-
 SHIRE POT-
 TERS WATER-
 WORKS CO.

1850.
GOULD
v.
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

tors, on his the plaintiff's part, to settle and determine the amount of the said purchase-money and compensation, in conjunction with one J. Leach, the other arbitrator so appointed, &c., and which said appointments and nominations were then, to wit, on &c., duly delivered by the plaintiff and defendants respectively to their respective arbitrators, and thereby, by virtue of the said Lands Clauses Consolidation Act, became and were submissions to arbitration on their respective parts. The declaration, after stating that the arbitrators, before entering on the consideration of the matters referred to them, subscribed the declaration required by the said Act, and by writing under their hands, bearing date, to wit, &c., in due form of law, pursuant to the provisions of the said Act, before entering on the before-mentioned reference, duly nominated and appointed R. S. Ford to be the umpire, to decide on any such matters as to which they should differ, or which should be referred to the said umpire, under the provisions of the said Acts or either of them, proceeded:—"And the plaintiff further saith, that the said J. Leach and T. Heaton, by writing under both their hands, twice, to wit, on the 29th of September and on the 23rd of October, in the year aforesaid respectively, duly enlarged the time for making their award, first, to the 23rd of October, 1848, and again, to the 20th of November, 1848, and, to wit, on the 1st of October, took upon themselves the burthen of the said reference, and heard and examined witnesses of both parties, but did not and could not agree, nor did they make any award concerning the premises, within the said extended time or times, or at any time whatsoever, but on the contrary thereof, by writing under their hands, bearing date, to wit, on the 15th of November, 1848, then submitted to him the said R. S. Ford, as such umpire as aforesaid, the matters of the said arbitration, and the said matters then referred devolved upon the said umpire, to be determined by him." [Then followed an averment that the umpire, before entering upon the consideration of the matters referred to him, duly made

and subscribed the declaration required by the Lands Clauses Consolidation Act, 1845.] "And the plaintiff in fact says, that afterwards, and within three calendar months after the expiration of the said enlarged time, and within three months after it devolved upon the said R. S. Ford to determine the said matters referred, to wit, on the 13th of February, 1849, he the said R. S. Ford took upon himself the burthen of the said umpirage, and having deliberately and at large heard, examined, and considered the allegations, witnesses, and evidences of both the said parties concerning the premises, within the said three months as aforesaid, to wit, on the day and year last aforesaid, made and published his award, umpirage, and final determination, in writing under his hand and seal, bearing date the day and year last aforesaid, between the said parties, of and concerning the premises, in manner and form following, that is to say." The declaration then stated the award, which found the amount of purchase-money to be paid by the defendants to the plaintiff to amount to the sum of 820*l.*; and then averred that "the said sum of 359*l.* 3*s.* 11½*d.*, hereinbefore mentioned, was and is a much smaller sum than the said sum so awarded to the plaintiff by the said R. S. Ford, whereof the said R. S. Ford afterwards, to wit, on the 23rd of June, 1849, had notice, and was then required by the plaintiff to settle and determine the costs to be paid by the defendants to him the plaintiff, under and by virtue of the said Lands Clauses Consolidation Act; and thereupon the said R. S. Ford, to wit, on the day and year last aforesaid, by an instrument in writing under his hand and seal, bearing date, to wit, the day and year last aforesaid, duly settled the costs of the plaintiff of the said arbitration, and thereby ascertained and settled the same to be, and they in fact were, the sum of 260*l.*, and did thereby direct the same to be paid by the defendants to the plaintiff; which said award and which said last-mentioned instrument in writing were afterwards, to wit, on the day and year last aforesaid,

1850.
 GOULD
 v.
 STAFFORD-
 SHIRE POT-
 TERS WATER-
 WORKS CO.

1850.
 GOULD
 v.
 STAFFORD-
 SHIRE POT-
 TERIES WATER-
 WORKS Co.

duly delivered by the said umpire to the defendants, and they then had notice thereof." The declaration concluded by averring that the plaintiff was ready and willing and offered to convey to the defendants a good and valid estate in fee simple in the said lands, &c., and to perform all things by him to be performed, &c., and requested the defendants to pay him the said several sums of 820*l.*, 4*l.* 3*s.* 7*d.*, and 260*l.*; but that the defendants would not pay, &c.

Special demurrer as to so much of the declaration as related to the sum of 260*l.*, that it did not appear that the said umpire had power to settle the costs at all; that he had no power to settle them by a separate and distinct instrument, subsequent to the making of his said award; that it did not appear that he had settled the costs within three months after the matters were referred to him, nor that the instrument in writing was an umpirage or award.—Joinder in demurrer.

Watson, in support of the demurrer.—There are four objections to this declaration. In the first place, assuming the umpire to be the proper person to ascertain the costs of the reference, those costs ought to have appeared in the award itself. This award, however, makes no mention of costs. The arbitrator is *functus officio* upon the award being made, and cannot by a subsequent act settle these costs. The power to refer the matter in dispute here is given by the Lands Clauses Consolidation Act, 8 & 9 Vict. c. 18. By the 23rd section, if the compensation claimed or offered exceeds 50*l.*, the party claiming may signify by notice in writing to the promoters of the undertaking his desire to have the question settled by arbitration. The 25th section provides for the appointment of an arbitrator by each of the parties, and the 34th section, which has reference to the costs, provides that "all the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the pro-

motors of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." The costs, therefore, as in the ordinary case, ought to be ascertained by the award. In *The London and North Western Railway Company and Quick* (a), Erle, J., held that the 34th section imposes on an umpire the duty of ascertaining whether the right of the claimant to costs under that section arises, and if it does, of settling their amount in his award, and that he cannot, by a subsequent certificate, entitle the claimant to obtain payment of them. Where the arbitrator has to ascertain the costs, they cannot be ascertained by the officer of the Court: *Morgan v. Smith* (b).

In the second place, these costs ought to have been ascertained by the *arbitrators*, and not by the umpire. The 34th section expressly provides, that the costs are to be settled by the arbitrators. The 23rd, 32nd, and 33rd sections, speak of "arbitrator or umpire," and by the 27th and 28th sections, the appointment of the *umpire* is only to take place in case the arbitrators differ.

Thirdly, the declaration is insufficient, as it does not contain any statement that the costs were ascertained within three months after the reference. It never could have been intended that the assessment of costs might be postponed to an indefinite period.

Lastly, the statement that the umpire was required by the plaintiff to settle and determine the costs, does not sufficiently shew that he had been required to adjudicate upon their account as arbitrator.

Martin, contra, was not called upon.

(a) 5 D. & L. 685.

(b) 9 M. & W. 427.

1850.
GOULD
v.
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

1850.
 GOULD
 v.
 STAFFORD-
 SHIRE POT-
 TERIES WATER-
 WORKS CO.

POLLOCK, C. B.—I am of opinion that the plaintiff is entitled to the judgment of the Court. The questions raised by this demurrer are four. The third and fourth are not entitled to much consideration, and may therefore be readily disposed of. The third is, that the declaration does not shew that the costs to which the plaintiff claims to be entitled were settled by the umpire within three months after he had taken upon himself the umpirage; and that so much of the decision of the referee, whether arbitrator or umpire, as has relation to those costs, is no award at all within the statute. It appears to me, that it is merely a taxation or settlement of costs, which, when settled, become a debt due from the party who ought to pay it. So the fourth objection, that it does not appear from the declaration that the umpire was duly called on to determine the costs according to the statute, or had duly taken upon himself to do so, also fails entirely, for it is stated in the declaration, that he was required by the plaintiff "to settle the costs," which is all that he is authorised to do under the 34th section of the Act in question.

The other two points made were these:—Mr. *Watson* says, in the first place, that these costs ought to have been settled by the umpire in his award, he the umpire being the person who had to award; and he says, secondly, if they may be assessed by a separate instrument, it ought not to be by the *umpire*, but by the *arbitrators*, because the 34th section mentions arbitrators only as the persons by whom such costs are to be settled. It may be observed, that these objections are inconsistent with each other. The second can only be taken on the supposition that the first is without foundation; for if it be true that these costs ought to be settled in the award itself, then the other objection never could have arisen. It appears to me, however, that neither objection ought to prevail. I think that the costs, in cases like the present, were intended to be settled by a separate instrument, and not by the award itself. That appears to be the result of the 34th section,

which is, that "all the costs of any such arbitration, and incident thereto, to be settled"—not awarded—"by the arbitrators, shall be borne by the promoters of the undertaking, unless the arbitrators shall award the same or a less sum than shall have been offered by the promoters of the undertaking, in which case each party shall bear his own costs incident to the arbitration, and the costs of the arbitrators shall be borne by the parties in equal proportions." It seems to me that the object of this Act of Parliament was, that the compensation for the land taken should be awarded in the first instance, and awarded wholly irrespective of any question as to what offer had been made for it, or what costs had been incurred, and the arbitrators or the umpire were by their award or umpirage simply to determine the amount of compensation. That having been decided, the question of the payment of costs will arise afterwards, and must be determined by the rule laid down in the 34th section, the amount being to be settled by the persons or person who made the award, namely, the two arbitrators, if they agreed to make one, and if not, then the umpire. That disposes of both those objections.

With respect to the first objection, the case has been cited of *The London and North Western Railway Company and Quick*, in which case my Brother *Erle* discharged the rule on grounds which seem inconsistent with the present decision. But, on examining the facts of that case, it appears that the rule there was very properly discharged, since it was better that the question raised by it should be discussed in an action to be brought between the parties. The 34th section says, "All the costs of any such arbitration, and incident thereto, to be settled by the arbitrators, shall be borne by the promoters, &c., unless the arbitrators shall award," &c. Now, it is plain, from the construction of the sentence, that the term "to be settled by the arbitrators," must mean the same person or persons by whom the first award was made; and, on referring

1850.
GOULD
v.
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

1850.
GOULD
v.
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

to the interpretation clause, sect. 3, the expression "arbitrators" may mean one arbitrator or umpire, or two or more arbitrators. It however clearly means that the same person who makes the award shall be the person to settle the costs. To my mind it is perfectly plain that the umpire who made the award is the person to determine the amount of these costs, and the amount is to depend on whether the award of compensation is for the same or a less sum than was offered in the first instance by the promoters of the undertaking. The sum so actually offered forms no element at all in the award. When, however, the sum for compensation has been awarded, it will then appear, by comparing it with the sum offered, which of the two parties is entitled to costs; and if the sum offered by the promoters was the same or a greater sum than that awarded, then each party is to pay his own; but if not, then the person who has made the award is to settle the costs, that is, tax the amount of the claim for costs, and settle the amount so claimed; and when that settlement has been made, the promoters are to bear the costs of the arbitration so settled by the person who made the award. It appears to me, therefore, that this declaration contains everything necessary to entitle the plaintiff to the judgment of the Court.

PARKE, B.—I agree with my Lord Chief Baron in this case, that our judgment ought to be for the plaintiff. I think that all four objections which have been relied upon by the defendant are untenable. The first, and most important, is, that the arbitrator or umpire, as the case may be, must include the taxation of costs like these in his award or umpirage; and this was contended for by analogy to the ordinary practice on submissions to arbitration, where everything to be inquired into must be included in the award. But the ground for that rule is to be found in the agreement of the parties to the submission, in which it is usually one of the terms that the arbitra-

tor is to make but one award. That condition is implied in all cases, unless something to the contrary is either expressed in or may be inferred from the submission. Here, however, the sole question is, whether, looking at the several clauses of this statute, the legislature meant that all to be done by the arbitrator or umpire was to be included in a single award or umpirage which he was empowered to make; and I think it quite clear that the legislature did not intend every matter of dispute to be comprised in a single award. By the 23rd section, the only matter referred to the arbitrators is the compensation to be paid for the lands required to be taken for the purposes of the undertaking—all they have to do is to ascertain the amount that ought to be so paid. Then we come to the 34th section, which directs that all the costs of any arbitration are to be borne by the promoters of the undertaking, unless the arbitrators award the same or a less sum than shall have been offered by the promoters of the undertaking; in which case, each party shall bear his own costs incident to the arbitration, and those of the arbitrators shall be borne by the parties in equal proportions; so that the necessity for making the taxation of costs depends entirely on the result of the award, whether a larger sum has been awarded than was offered by the promoters of the undertaking. Now, as my Brother *Rolfe* observed during the argument, the arbitrators or umpire have no power in the first instance to inquire into the costs, or anything beyond the compensation to be made; they are to determine each of the questions separately, the intention of the legislature being that, so soon as it becomes necessary that the costs of the arbitration should be determined by the arbitrators, they shall have the power to tax them by an instrument other than the award.

The next objection was, that the 34th section of the statute requires the costs to be settled by the arbitrators,

1850.
GOULD
".
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

1860.

GOULD

OF

STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

not the umpire. The rule we have always followed in construing statutes is to take the words in their grammatical sense, unless some inconvenience or incongruity would result from so doing; and if we are to read the clause, "all the costs of any such arbitration and incident thereto to be settled by the arbitrators," according to its grammatical construction, the inconvenience would follow, that unless the arbitrators have made an award for the sum to be paid by way of compensation, there could be no taxation of the costs at all; for the words are, that the costs are to be settled by the arbitrators, and "unless they award the same or a less sum than was offered by the promoters of the undertaking," &c.; so that, if we were to confine the second part of this section to the case of arbitrators, it would be inapplicable where the umpire is called upon to award compensation. To avoid such an absurdity, we must read that latter part of the section as if the words were "unless the arbitrators or umpire shall award the same or a less sum than that offered;" and the word "arbitrators" in the former part of the clause must be read in the same way. An additional reason for this construction is, that the legislature were more likely to leave the arrangements as to the amount of these costs to the same person who had adjudicated on the transaction in its former stage.

With respect to the decision of my Brother *Erie*, in *The London and North Western Railway Company and Quick*, which has been relied upon, no one has a higher respect for that learned Judge than myself; but the Court is not so much bound by the decision of a single Judge as if the matter had been adjudicated on by the full Court. I own that the reasons which are there given for allowing the second objection in that case are not satisfactory to my mind, and I think that the learned Judge was misled by a supposed analogy to the ordinary cases of reference to arbitration, where the powers of the arbitrators are determined by the

language of the submission. No such inference can be drawn from the different clauses in this Act of Parliament; the inference from them is more in favour of the contrary construction, namely, that the award and settlement of costs are to be by two instruments rather than by one.

As to the two last objections, it will not be necessary to say much. The first of them is, that it does not appear that the umpire settled these costs within three months after the matter was referred to him. By the Act of Parliament, the award as to the amount of compensation is to be made within three months after the reference, but not a word is said about the *costs* being settled within any particular time. It was urged, that delay in settling the costs might be productive of inconvenience; but the party entitled to them can at any time call on the arbitrators or umpire to settle them. It is not likely that any reasonable time would be allowed to elapse; but whenever the party does so call on them, they, having accepted the office of referees, would, I think, be bound to perform the whole of the trust reposed in them.

The last objection is, that there is no averment in this declaration that the parties called on the umpire to adjudicate on these costs; but this fails also, as it alleges that he was called on to settle the amount of costs, and that he did so; and consequently they are bound by the statute to pay them.

ROLFE, B.—I am entirely of the same opinion. With respect to the first objection, were it not for the judgment of my Brother *Erlé*, in *The London and North Western Railway Company and Quick*, I should have thought the matter entirely free from doubt; for these costs are not to be taxed at all until by a matter extrinsic, that is to say, by looking at the amount awarded, and other explanatory matter to which the award has no reference, we see the relation between the sum awarded and that originally

1850.
GOULD
v.
STAFFORD-
SHIRE POT-
TERIES WATER-
WORKS CO.

1850.
 GOULD
 v.
 STAFFORD-
 SHIRE POT-
 TERS WATER-
 WORKS CO.

offered by the promoters. However, in the case which came before my Brother *Erle*, there was good ground for discharging the rule, namely, that the question was one which ought not to be disposed of on a rule, and ought to be made the subject of an action. In the above construction of this 34th section, I adopt the able argument of Mr. *Watson* in that case, which does not appear to have had its due weight with the Court.

PLATT, B., concurred.

Judgment for the plaintiff.

April 19. THE BIRKENHEAD, LANCASHIRE, AND CHESHIRE JUNCTION RAILWAY COMPANY v. COTESWORTH and Others.

The form of declaration given by the 26th section of the 8 & 9 Vict. c. 16, is not applicable in an action for calls against an executor, where the calls were made in the lifetime of the testator.

DEBT for calls.—The declaration was in the form given by the 8 & 9 Vict. c. 16, s. 26. The defendants pleaded, first, never indebted; and secondly, that they “were not nor are the holders of the said shares,” *modo et formâ*; upon which pleas issues were joined. At the trial of the cause, before *Cresswell*, J., at the last Chester Assizes, it appeared that the three defendants were the executors of a person named James Gilfillan, who was the registered owner of the shares in question, and had died after the calls were made. The defendant Cotesworth alone proved the will, power being reserved to the other executors to come in and prove also. It was thereupon objected by the defendants’ counsel, first, that the defendants were not liable in this form of action; and secondly, that the action was not maintainable against all the defendants. The learned Judge was of opinion that the action would not lie, and the plaintiffs were nonsuited, leave being reserved to them to move to set the nonsuit aside, and to enter a verdict for them for the amount of the calls.

Welsby now moved accordingly.—The first question is, whether the general form of declaring, given by the 26th section of this Act, is correct in the present case. That question will depend upon the Act, to be construed as a whole. The 26th section enacts, that “in any action against any shareholder to recover any money due for a call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the Company to declare that the defendant is the holder of one share or more in the Company (stating the number of shares), and is indebted to the Company in the sum of money to which the calls in arrear shall amount, in respect of one call or more, upon one share or more, (stating the number and amount of each of such calls), whereby an action hath accrued to the Company, by virtue of this and the special Act.” Perhaps that section, taken by itself, would not be applicable to the present case, and therefore the 21st section must be imported into it. That section enacts, “that the several persons who have subscribed any money towards the undertaking, or their *legal representatives* respectively, shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company; and with respect to the provisions herein or in the special Act contained for enforcing the payment of calls, the word ‘shareholder’ shall extend to and include the legal representatives of such shareholder.” [*Parke, B.*—Then we must also include the 27th section, which is, that “on the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, *at the time of making such call*, was the holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special Act,” &c. That section does not apply to these defendants, who are liable *solely* as executors.] Then the 21st section becomes of no

1850.
BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY CO.
v.
COTTESWORTH.

1850.

BIRKENHEAD,
LANCASHIRE,
AND CHESHIRE
JUNCTION
RAILWAY Co.
v.
COTESWORTH.

practical effect. [*Parke*, B.—That section means, that the executor is liable on the shares of his testator.] So he would be at law. [*Parke*, B.—By that clause the legislature perhaps intended, that as long as the executor holds the shares, whether he have funds of his testator or not, he is liable for the calls. Your argument would go to shew that there might be two shareholders with respect to the same shares at one and the same time: that, if an action be brought against a person in his lifetime for calls, he is the shareholder, and if he dies, and an action is brought against his executor, the executor is the shareholder also; which appears to be absurd. *Pollock*, C. B.—I do not see how we can apply the provisions of the 26th section to the present case.] It must be admitted that they are not per se applicable.

POLLOCK, C. B.—For the reasons already given, I think that the nonsuit was perfectly correct, and therefore that there ought to be no rule.

PARKE, B.—I am of the same opinion. It is impossible to say, that these defendants, who are executors of a person who died since the calls were made, were shareholders at the time the calls were made, and so that the general form given by the 26th section of this statute is applicable to the present case. With respect to the language of the 21st section, I am inclined to think, that the effect of the words “legal representatives,” in that section, is to make executors liable for calls, at all events so long as they are in possession of the shares. But be that as it may, I think its effect is not to make the testator and his executor shareholders of the same share at the same time. It is therefore clear that this form of declaration is improper, and that the action for that reason is not maintainable.

ROLFE, B. and *PLATT*, B., concurred.

Rule refused.

1850.

April 19.

CHAMBRES v. EDWARD JONES, JOHN FOULKES, WILLIAM MORRIS, and ROBERT JONES.

ASSUMPSIT for work done as an attorney, for money paid, and on an account stated.—The defendants Morris and Robert Jones pleaded (*inter alia*) non assumpserunt; the other defendants suffered judgment by default. At the trial of the cause, before *Cresswell*, J., at the last Assizes for Flintshire, the following facts appeared:—The plaintiff was an attorney, and the defendants were the churchwardens and overseers of Tryddyn, in the county of Flint; and the action was brought for business done by the plaintiff as an attorney, in the matter of an appeal against an order for the removal of certain paupers from Ellesmere to Tryddyn, made in January 1847, the plaintiff conducting the business under the verbal instructions of the then parish officers of Tryddyn. The plaintiff, in 1848, made out his bill against the parish for the business done, and had it taxed; but it was arranged that, as a case granted by the Quarter Sessions, on the trial of the appeal, then stood for the opinion of the Court of Queen's Bench, the payment of his bill should be deferred. On May 30, 1849, the case was decided by that Court, and the plaintiff delivered his bill to the defendants. The defendants came into office in April 1849. The defendant Foulkes was also in office in 1847, and was one of the parties who authorised the business. The defendants Morris and Robert Jones were also in office in the year 1848-9. During their term of office, a vestry was held, and a resolution was come to, and entered in the vestry-book, authorising the payment of the plaintiff's demand. Upon this state of facts, it was contended, on the part of the defendants Morris and Robert Jones, that the defendants were not all jointly liable, inasmuch as they had not jointly retained the plaintiff or authorised the

The 1st and 2nd sections of the stat. 11 & 12 Vict. c. 91, do not transfer the personal liability of overseers, for debts contracted for legal proceedings relating to parish business, to their successors in office.

1850.
CHAMBERS
v.
JONES.

business done by him, and churchwardens and overseers could not, by such a contract, bind their successors. For the plaintiff, the stat. 11 & 12 Vict. c. 91, was referred to. The learned Judge directed a nonsuit, leave being reserved to the plaintiff to move to enter a verdict for himself on the general issue.

Townsend now moved accordingly.—The present case at first sight appears not be distinguishable from that of *Marsh v. Davies* (a), and the plaintiff would not contend that it is, were it not for the stat. 11 & 12 Vict. c. 91. By sect. 2, it is enacted, that where any proceedings have been commenced, or shall be hereafter carried on, for or on behalf of any parish in a Court of law, regarding any matter affecting the poor rates of such parish, it shall not be necessary that the bill of costs of the solicitor or attorney engaged therein shall be paid before the termination of the proceedings, but in any such case, the amount of the bill, when duly taxed, when otherwise chargeable against the parish, shall be payable out of the poor rates, within the space of one year next following the termination of the proceedings, but not afterwards, unless the commissioners aforesaid shall by their order authorise the payment of the costs and expenses attending any such proceeding, by annual instalments not exceeding five, to commence from such termination." By the 1st section it is enacted, that if overseers contract debts within three months of the termination of their year of office, their immediate successors shall discharge the same. The words of that section are general—if they "contract *any* debt." It is submitted that, upon these sections, the defendants are liable. [*Parke*, B.—The statute merely empowers the successors to levy a rate for the payment of the amount, but it does not transfer the

(a) 1 Exch. 668.

contract from one overseer to another.] The plaintiff's remedy therefore, would, as it seems, be by mandamus to compel the rate.

1850.
CHAMBERS
v.
JONES.

POLLOCK, C. B.—There will be no rule. The statute does not make these officers personally responsible, by transferring the contracts of their predecessors to them. The ruling of the learned Judge was quite correct.

PARKE, B., ROLFE, B., and PLATT, B., concurred.

Rule refused.

SKELTON v. MOTT.

April 26.

DEBT for the board and education of the defendant's son.—Pleas, first, never indebted; and secondly, the discharge of the defendant under the Insolvent Act, 1 & 2 Vict. c. 110. The plaintiff replied by joining issue upon the first plea, and to the second by denying the discharge, upon which issue was joined.

Under the 69th section of the Insolvent Act, 1 & 2 Vict. c. 110, the words "debts growing due" mean debts ascertained and payable in futuro.

At the trial, before *Alderson*, B., at the Middlesex Sitings in the present term, it appeared that the action was brought to recover the sum of 27*l*. 3*s*., for the board and education of the defendant's son for the half-year ending at Christmas, 1846. On the 28th of November, and during the half-year, whilst the defendant's son was at school, the defendant was arrested, and was committed on the 30th of that month, and he thereupon took the benefit of the Insolvent Act, and filed his schedule upon the 2nd of December, and received his discharge on the 8th of March, 1847. There was a debt of 99*l*. 9*s*. 3*d*. due for board, &c., up to Midsummer, 1846, but the entry in the schedule was for 99*l*. Under these circumstances, a verdict was entered for the plaintiff by the direction of the

1850.
 SKELTON
 v.
 MOFF.

learned Judge, with leave to the defendant to move for a rule to enter the verdict for himself upon the second issue.

Bovill now moved accordingly.—There are two questions in this case; the first is, whether the debt is properly described in the schedule; and the second is, whether this was “a debt due or growing due” at the time of the making of the order under the Insolvent Act, within the true meaning of the language of the 69th section of the Act. As to the first point; in *Hoyles v. Blore* (a) the insolvent, by mistake, and without fraud, inserted the debt as 3*l.*, whereas in fact it was 7*l.*, and the Court held, that the defendant was not protected; but that case is distinguishable from the present, for there is a distinction made in the Act between debts up to 5*l.*, and such as exceed that amount; and *Parke*, B., in delivering the judgment of the Court, says, “But if the sum specified, instead of *not being exactly* the true amount, is less than half that amount, or is much below 5*l.* and the real debt above it, and the difference is so great that it removes the creditor from a class entitled to special notice to one not entitled, does the section apply? It seems to me that it does not, and that, if there is such an error in the description, which so materially alters the condition of the creditor, the statute does not permit the adjudication to operate as a discharge, even though there may have been no fraud, culpable negligence, or ill intention.” [*Pollack*, C. B.—If the second question be decided against you, the first will become immaterial, and therefore you had better, in the first instance, satisfy us that this is such a debt as might and ought to have been inserted in the defendant’s schedule.] This was a growing debt, payable at the end of the half-year. The additional items would be

(a) 14 M. & W. 38.

merely ancillary to the principal debt. In *Berry v. Irwin*(a) it was held, that the insolvent is discharged as to a judgment, although it include costs arising after the filing of the schedule. [*Pollock*, C. B.—The words of the Act are “debts due or growing due;” that is, then due or to become due. *Parke*, B.—It clearly means debitum in presenti solvendum in futuro: a *debt*, though not then payable. *Alderson*, B.—How could an *unascertained* debt be inserted in the schedule?]

1850.
SKELTON
“
MORT.

POLLOCK, C. B.—There will be no rule. The Act does not say a growing debt, but a debt growing due.

PARKER, B.—According to the true construction of the Act, it must be a debt ascertained and payable in futuro.

ALDERSON, B., and ROLFE, B., concurred.

Rule refused.

(a) 19 L. J., C. P., 110.

1860.

May 8.

LINWOOD, Administratrix of MATTHEW LINWOOD,
v. SQUIRE.

To an action of covenant for non-payment of an annuity, brought by the administratrix of A. upon a covenant, which stated that A. would stand possessed of the said sum, in trust to pay the same to E. S. (the defendant's wife), upon receipt thereof, to the use of the defendant's wife, (being under terms of pleading issuably,) pleaded, that the intestate never executed the deed, nor did he ever become a trustee under it. The plaintiff having signed judgment thereon:—*Held*, that the judgment was wrongly signed.

UDALL had obtained a rule in this case, calling on the plaintiff to shew cause why the interlocutory judgment signed by him should not be set aside. It was an action of covenant, brought to recover a certain sum due for an annuity. The declaration stated an indenture made between the defendant of the first part, Eliza Squire his wife of the second part, and Matthew Linwood, deceased, of the third part (profert), which, after reciting that the defendant and his wife had agreed to live separately, contained a covenant by the defendant with the said M. Linwood that the defendant would pay M. Linwood, during the life of his wife Eliza, an annuity of 52*l*.

The defendant, after craving oyer, set out the indenture, which contained the following clause (inter alia):—"And the said Matthew Linwood doth hereby declare, that he shall and will stand and be possessed of the said annuity of 52*l*., in trust to pay the same to the said Eliza Squire, when the same shall be received, to and for her use." (The deed was not signed by Linwood, although it was by the defendant and Eliza Squire). He then pleaded, that the said Matthew Linwood never executed the said indenture, nor declared that he would stand possessed of the said annuity in trust to pay the same to the said Eliza Squire, when the same should be received, for her use, nor did he ever become, nor is the plaintiff, a trustee under the said deed.—Verification.

The defendant being under terms of pleading issuably, the plaintiff signed judgment on the ground that this plea was not issuable.

Bramwell shewed cause.—The plaintiff was clearly entitled to sign judgment. The plea is not issuable. The

1850.
 LINWOOD
 v.
 SQUIRE.

effect of it is, that the covenantee did not execute the deed. The action is brought by the administratrix of the trustee, upon a covenant which was for the benefit of the latter. It is not alleged in the plea, that Matthew Linwood ever dissented from taking the trusteeship, and it is therefore to be presumed that he assented to that which was for his own advantage. In *Wetherell v. Langston* (a), it was held by the Court of error, that if A. covenant with B. and C., their executors, administrators, and assigns, although C. do not execute the deed, or assent to the covenant, and afterwards disclaim it by deed, to which A. is no party, B. cannot alone (whilst C. is alive) sue A. upon the covenant. In that case the covenantee did not assent, and afterwards disclaimed. [*Parke, B.*—That case was not argued in the Court below; and I believe some doubts have been entertained as to the correctness of the decision at which the Court of error arrived.] He was then stopped by the Court, who called upon

Udall, in support of the rule.—The plea is good. Even if it be not so, the plaintiff should not have signed judgment, inasmuch as there is no decision to the effect that the administrator of a trustee, suing upon a covenant to which the trustee did not assent in his lifetime, makes the covenant a binding one by the mere fact of an action being brought upon it. This covenant would not be for the personal benefit of the intestate; he was to hold the proceeds to the use of the wife; and as he never assented to this during his lifetime, the assent of the administratrix cannot be held to supply the place of such assent; and consequently, the bringing of the action by the administratrix is wholly insufficient. In *Pitman v. Woodbury* (b), which was an action of covenant upon a lease, for non-repair of the premises thereby alleged to have

(a) 1 Exch. 634.

(b) 3 Exch. 4.

1850.
LINWOOD
v.
SQUINN.

been demised, the defendant pleaded that the plaintiff never executed the lease, and that he the defendant did not hold the premises under the lease in question, but under a totally distinct agreement; and the defence was held to be substantially good. The plaintiff, therefore, ought to have objected to the validity of this plea by demurrer, as the question raised is by no means free from doubt.

Bramwell was again heard against the rule.—The plea is open to the objection of being false, and is also of a character which is likely to cause embarrassment to the plaintiff.

PARKER, B.—I do not say that the plea is a good plea, as it is not necessary to decide that question; but a plaintiff has no right to sign judgment, if the plea raises a serious question, and one which is fit for discussion. Now, assuming it to be the law that a party is presumed to assent to that which is for his personal benefit, the rule does not necessarily apply to trusts, which impose an onerous obligation. In the latter case, it is doubtful whether there ought not to be the assent of the covenantee in his lifetime, in order to make the covenant binding.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

1850.

May 7.

THE EASTERN UNION RAILWAY COMPANY v. SYMONDS.

THIS was an action for railway calls. The declaration contained a count upon the deed of settlement, stating specially the facts of the defendant being the holder of shares, the resolution for a call, &c., and averring notice thereof to the defendant.—There was a plea denying the notice, upon which issue was joined.

At the trial, before *Wightman*, J., at the last Assizes for Suffolk, it appeared that, when a call was made, the course of business at the office of the Company was for a clerk, of the name of Chapman, to fill up printed notices of calls, and direct them, according to a list made out from the address book, in which the shareholders were arranged in classes A, B, and C, and then to put the notices into a basket; and it was the practice of another clerk to post the letters which were in the basket; and it was proved that he had posted all that were in the basket on this occasion, which were addressed to shareholders in Class C. Chapman was dead, but a list of shareholders, containing the name of the defendant, was produced, which bore an indorsement in his handwriting, "Letters sent out." It was also proved that he had received instructions to make out such list, and that he had been seen in the act of filling up and directing the notices, with such a list before him. It did not appear in which class the defendant's name was. The defendant's counsel objected, that the list produced and indorsement thereon were not admissible as evidence of the notice having been sent, inasmuch as it did not appear when the indorsement was made. The learned Judge received the document in evidence, and a verdict was found for the plaintiffs, leave being reserved for the defendant to move to enter a nonsuit.

In an action for railway calls, the plaintiff proved that it was the course of business for C., a clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put the notices into a basket; and it was the practice for another clerk to post the letters which were in the basket, which he had done on this occasion. C. was dead, but a list of shareholders, containing the name of the defendant, was produced in his handwriting, and indorsed by him, "Letters sent out." C. had received instructions to make out such list, and had been seen filling up and directing the notices, with such a list before him:—*Held*, that the list so indorsed was admissible as evidence that notice of the call had been sent to the defendant, notwithstanding it was not distinctly shewn when the indorsement was made.

1850.
EASTERN
UNION
RAILWAY CO.
v.
SYMONDS.

O'Malley moved accordingly (April 16).—There was no proof when the indorsement was made on the list, and therefore it was not admissible as evidence of the notice having been sent. It should have been proved to have been a contemporaneous indorsement. [*Parke, B.*—The Judge must be satisfied by reasonable evidence that the indorsement was contemporaneous.] The authorities collected in 1 *Smith's Lead. Cas.* 140, and *Taylor on Evidence*, s. 406, shew that the entry of a deceased clerk is not admissible unless made at the time of the transaction. Besides, the shareholders were divided into three classes, and it did not appear that the defendant belonged to that class to which the notices were given.

Cur. adv. vult.

POLLOCK, C. B., now said:—In this case we think that there ought to be no rule. The ground of the application, and which the Court has taken time to consider, is, whether there was sufficient evidence to justify the learned Judge in receiving a list of shareholders in the handwriting and indorsed by a clerk of the name of Chapman, who was dead. The question was, whether notice of the call had been given to the defendant; and it appeared that a list was made out of persons to whom notice was to be given, and that a list was found indorsed by Chapman as containing the names of the persons to whom he had sent notices; and if that were written contemporaneously with the transaction, there could be no doubt that it was correctly received, according to a class of cases so well known in the profession that it is unnecessary to repeat them. It was contended, for the defendant, that there was a total absence of all evidence that the paper was written within such a period as to be receivable in evidence; but, on looking at the learned Judge's notes, it is clear that, at the time when Chapman was actually engaged in the business of making out the notices, a list was seen in his pos-

session,—such a list as, according to the mode of conducting business, ought to have existed. Subsequently a list was found, corresponding with that, and indorsed by him; and it appears to us, that the learned Judge was perfectly correct in receiving that as evidence. It was for him to decide whether, under the circumstances, the list was receivable in evidence; and we think he correctly decided that it was receivable, on the ground that a list was proved to have existed contemporaneously, and a list was produced at the trial corresponding with that which ought to have existed, and indorsed by the deceased. We think the evidence reasonably sufficient to satisfy the mind of any one that the list produced was the same list that Chapman, the deceased, had in his possession at the time he made out the notices. It was objected, that these notices were given to Class C, and it was uncertain whether the defendant was in Class A, B, or C. It appears to us that that is a matter of indifference, because it was not suggested that there was a different call for the different classes. There was only one call, though, in giving the notices, the shareholders were divided into classes. On these grounds, it appears to us that the proof was properly received, and that the verdict was right. Therefore, there will be no rule.

Rule refused.

1850.
EASTERN
UNION
RAILWAY Co.
v.
STYMONDS.

1850.

May 8.

RIGBY v. HEWITT.

In an action for negligence, it appeared that the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and, in trying to avoid a cart, a wheel of the defendant's omnibus came in contact with the step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post, and he was thrown off:—*Held*, that the jury were properly directed, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate; and that, if the jury thought that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavouring to avoid the accident, the defendant was liable.

CASE for negligence in driving the defendant's omnibus, whereby it came in contact with another omnibus on which the plaintiff was sitting, and the plaintiff was thrown off and injured.—Plea, not guilty.

At the trial, before *Rolfe*, B., at the last Liverpool Assizes, it appeared that the plaintiff was a passenger outside an omnibus which, just before the accident, had started from Market-street, Manchester, at the same time as the defendant's omnibus. The drivers were competing for passengers, each endeavouring to get first; and, while the omnibuses were going at great speed, in trying to avoid a cart which was in the way, the wheel of the defendant's omnibus came in contact with a projecting step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone. The speed with which it was going rendered it impossible for the driver to pull up, and the seat on which the plaintiff sat struck against a lamp-post, and he was thrown off. The learned Judge told the jury, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driven at a furious rate; and that, if the jury thought that the collision took place from the negligence of the driver of the defendant's omnibus, and that the other omnibus was not in fault in not endeavouring to avoid the accident, then the defendant was liable. The jury having found a verdict for the plaintiff, with 50% damages,

Bliss moved for a new trial, on the ground of misdirection (April 18).—The plaintiff is in the same situation as the owner of the omnibus on which he was a passenger; and, if the conduct of the driver was such as to disentitle

the owner to sue, the plaintiff cannot recover: *Thorogood v. Bryan* (a). Now, the speed at which that omnibus was driven rendered it impossible to use ordinary precaution in order to avoid the collision or its consequences. But for this circumstance the injury would not have happened, and it was the result of the joint negligence of both parties. The omnibus on which the plaintiff sat would not have been forced against the lamp-post if it had travelled at a proper pace. There was, therefore, an absence of ordinary care on the part of the driver. *Butterfield v. Forrester* (b) decided that a person who is injured by an obstruction in a highway, against which he fell, cannot maintain an action if it appear that he was riding with great violence and want of ordinary care, without which he might have seen and avoided the obstruction. Lord *Ellenborough*, C. J., there says, "A party is not to cast himself upon an obstruction which has been made by the fault of another, and avail himself of it, if he do not himself use common and ordinary caution to be in the right." In *Lack v. Seward* (c), which was an action for the negligence of the defendant's servants in managing a barge, so that the plaintiff's barge was run down, Lord *Tenterden*, C. J., ruled, that the plaintiff was not entitled to recover if the accident could have been avoided but for the negligence of the plaintiff's own men, in not being on board his barge at a time when it was lying in a dangerous place. In *Luxford v. Large* (d), which was an action against the captain of a steam vessel for swamping a loaded wherry on the river by a swell produced by a too rapid rate of passage, Lord *Denman*, C. J., told the jury, that if they thought that the plaintiff contributed to the injury by his own improper conduct, either in mismanaging or overloading the boat, they must find their verdict for the defend-

1850.
 RIGHT
 v.
 HEWITT.

(a) 8 C. B. 115.

(b) 11 East, 60.

(c) 4 C. & P. 106.

(d) 5 C. & P. 421.

1850.
 BREST
 v.
 HAWKINS.

ant. A person driving on the wrong side of the road is bound to use more care to avoid any concussion than would be requisite if he were on the proper side of the road: *Pluckwell v. Wilson* (a). In *Woolf v. Beard* (b), *Coleridge, J.*, ruled that, if the plaintiff by his own negligence contributed to the accident, he could not recover, even though the jury should think that the defendant was guilty of negligence. The law was laid down in similar terms by *Tindal, C. J.*, in *Hawkins v. Cooper* (c), and the principle was recognised in *Smith v. Dobson* (d).

Cur adv. vult.

POLLOCK, C. B., now said:—This was an action tried before my Brother *Rolfe*, at Liverpool, when there was a verdict for the plaintiff, damages 50*l*. It appeared that the plaintiff was a passenger on the top of an omnibus, which was struck by the defendant's omnibus, and the consequence was, that the omnibus on which the plaintiff was, continuing its career, ran against some obstacle, and the plaintiff was thrown off with considerable violence. My Brother *Rolfe* directed the jury to ascertain whether the mischief arose from the negligence of the driver of the defendant's omnibus, and the jury found that the collision did arise from that negligence. Mr. *Bliss* moved for a new trial, on the ground that my Brother *Rolfe* had not directed the jury, that, if the mischief was in part occasioned by the misconduct of the person driving the omnibus on which the plaintiff was, the defendant would not be responsible, the facts being, that the two omnibuses were going at a great rate, and the omnibus on which the plaintiff sat was driven at such a rate that, after the collision, it could not pull up so as to avoid the accident. We are all of opinion that there ought to be no rule, and that

(a) 5 C. & P. 375.

(b) 8 C. & P. 373.

(c) 8 C. & P. 473.

(d) 3 M. & G. 59.

there is no fault to be found with the direction of my Brother *Rolfe*. The rest of the Court are entirely of opinion, that, generally speaking, where an injury arises from the misconduct of another, the party who is injured has a right to recover from the injuring party for all the consequences of that injury. On the present occasion I entirely concur with the Court that there ought to be no rule, and that the direction was perfectly right. I am, however, disposed not quite to acquiesce to the full extent in the proposition, that a person is responsible for all the possible consequences of his negligence. I wish to guard against laying down the proposition so universally; but of this I am quite clear, that every person who does a wrong, is at least responsible for all the mischievous consequences that may reasonably be expected to result, under ordinary circumstances, from such misconduct; and I think that, in the situation of these parties, any distinction which I might be disposed to draw in an extreme case, does not arise in the one which is now before the Court. We are all of opinion that, in this case, there should be no rule(*a*).

1880.
Exsey
v.
Hawitt.

Rule refused.

(*a*) See the next case.

GREENLAND *v.* CHAPLIN.

May 8.

CASE for negligence in navigating the defendant's steam-boat, whereby it struck against another steam-boat, on which the plaintiff was a passenger, and, in consequence, his leg was broken.—Plea, not guilty.

A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence, that part

of the mischief would not have arisen if the person injured had not himself been guilty of some negligence.

Therefore, where the plaintiff, a passenger on board a steam-boat, was injured by the falling of an anchor, caused by the defendant's steam-boat striking the other steam-boat—*Held*, that it was improper to direct the jury, that, if they thought the collision was owing to the bad navigation of the defendant's steam-boat, they should find for the plaintiff, unless there was negligence, either in the stowage of the anchor or in the plaintiff putting himself in the place where he was, so as to lead or contribute to the mischief; in which case the plaintiff could not recover.

Quære, per *Pollock*, C. B., whether a person guilty of negligence is responsible for all possible consequences of it, although they could not have been reasonably foreseen or expected.

1850.
GREENLAND
v.
CHAPLIN.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Michaelmas Term, it appeared that the plaintiff was a passenger on board a steam-boat called "The Sons of the Thames," which was going from Westminster to London Bridge. The defendant's steam-boat, called "The Bachelor," was going the same way, and, as the vessels approached the Adelphi Pier, "The Bachelor" struck "The Sons of the Thames" on the bow, where the anchor was carried, and, in consequence, it fell upon and broke the plaintiff's leg. There was conflicting evidence as to the degree of negligence attributable to the respective steam-boats, and especially as to the propriety of the mode in which the anchor on board "The Sons of the Thames" was carried in the bow of the vessel. The learned Judge told the jury, that if they were of opinion that the collision was owing to the bad navigation of "The Bachelor," they should find a verdict for the plaintiff; but if they thought that there was any negligence, either in the stowage of the anchor, or in the plaintiff putting himself in the place where he was, on board "The Sons of the Thames," they should find for the defendant. The jury having found a verdict for the plaintiff, with 200*l.* damages,

Shee, Serjt., in last Hilary Term obtained a rule nisi to set aside the verdict, as against evidence, no objection being taken as to the mode in which the question was left to the jury.

Humfrey and *A. Fry* shewed cause (April 27).—The question of negligence was one peculiarly for the jury, and their finding ought not to be disturbed unless it is manifestly wrong. The case was left to the jury too favourably for the defendant, for, as the collision arose from the negligent navigation of the defendant's vessel, it was immaterial in what way the anchor was placed on board the

other vessel. The general rule of law, as laid down in *Davies v. Mann*(a), is, that although there may have been negligence on the part of the plaintiff yet, unless he might, by the exercise of ordinary care, have avoided the consequences of the defendant's negligence, he is entitled to recover. *Parke*, B., there says, "This subject was fully considered by this Court in the case of *Bridge v. The Grand Junction Railway Company*(b), where, as appears to me, the correct rule is laid down concerning negligence, namely, that the negligence which is to preclude a plaintiff from recovering in an action of this nature, must be such as that he could by ordinary care have avoided the consequences of the defendant's negligence." Even if the jury had thought that the mode of carrying the anchor was improper, the defendant would nevertheless be liable for injury caused by his negligent conduct in striking the anchor: *Sills v. Brown*(c). A trespasser is entitled to compensation for injury done to him by a spring-gun placed without notice on the land on which he trespasses: *Bird v. Holbrook*(d). In *Catlin v. Hills*(e), where the facts of the case were similar to the present, *Cresswell*, J., told the jury that they must dismiss from their minds all that had been said about the stowing of the anchor, for that the plaintiff would be entitled to a verdict, even though they should think the anchor had been improperly left unfastened. It is not necessary in this case to dispute the authority of *Thorogood v. Bryan*(f).

Shee, Serjt., *Bramwell*, and *A. W. Simpson*, in support of the rule.—The plaintiff cannot recover if the injury in part arose from the negligent stowage of the anchor. *Thorogood v. Bryan* decided that a passenger in a carriage, or on board a vessel, is so far identified with the owner,

1850.
GREENLAND
v.
CHAPLIN.

(a) 10 M. & W. 546.

(b) 3 Id. 244.

(c) 9 C. & P. 601.

(d) 4 Bing. 628.

(e) 8 C. B. 123.

(f) Id. 115.

1850.
 GREENLAND
 v.
 CHAPLIN.

that negligence on the part of the owner or his servant is to be considered negligence of the passenger himself. The persons navigating "The Bachelor" had a right to expect that the anchor of "The Sons of the Thames" would be safely stowed, or, at all events, that passengers would be kept out of the way of injury. The true principle is, that the person injured cannot recover if negligence on his part conduced to the accident. Here three things concurred to cause the injury, viz. the plaintiff placing himself in a dangerous situation, the anchor being improperly stowed, and the defendant's vessel striking the other. This case is governed by *Butterfield v. Forrester* (a), where Lord *Ellenborough* said, "One person being in fault will not dispense with another's using ordinary care for himself." That rule was recognised and adopted in *Bridge v. The Grand Junction Railway Company*. [*Pollock*, C. B.—Can it be said that a person guilty of negligence is responsible for all the possible consequences, which he could never have foreseen, and which no one would have anticipated? For instance, if a person chooses to walk in a crowded street with an open knife under his coat, and another person negligently runs against him, is that other person to be responsible for all the injury which the knife may inflict on the person who carries it?] *Flower v. Adam* (b) is an express authority that, if the proximate cause of damage be the plaintiff's unskilfulness, although the primary cause be the misfeasance of the defendant, the former cannot recover.

Cur adv. vult.

POLLOCK, C. B., now said:—In this case, which is very analogous to *Rigby v. Hewitt*, and where the same question might have arisen, the plaintiff recovered a verdict, with 200*l.* damages. The foundation of the action was, that a steam-

(a) 11 East, 60.

(b) 2 Taunt. 314.

boat, belonging to the defendant, had been so negligently conducted that it ran against a steam-boat on board of which the plaintiff was a passenger, in consequence of which an anchor, which was displaced, fell over and broke the plaintiff's leg. At the trial, the jury found that the management of the vessel on board which the plaintiff was, was right, and that the conduct of the defendant's vessel was negligent and wrong. I must say, though there was evidence on both sides, and it would have been equally satisfactory to me if the verdict had been the other way, that it was a question proper to be disposed of by a jury, and that their verdict ought not now to be disturbed. My Brother *Sho* contended, that the accident in part arose from the negligent stowage of the anchor, and from the plaintiff being in a part of the vessel where he ought not to have been. But the jury negatived both these propositions, and found a verdict for the plaintiff, notwithstanding I told them, no doubt incorrectly, that, if they thought either that there was negligence in the stowage of the anchor, or that the accident arose from the plaintiff being in a part of the vessel where he ought not to have been, they ought to find for the defendant. The jury, however, found as a fact, that neither the one nor the other of those matters in reality existed; and the motion for a new trial was made on this ground,—that the law, as laid down by me, was correct, and that the verdict of the jury was wrong, it being against the evidence. I must own that, on the fullest consideration which I can give to the result of the evidence, I am not prepared to say that I am dissatisfied with the verdict; the rule will therefore be discharged. But I may add that, on consideration, I am of opinion that the law, as laid down by me in this respect, was not correct. I entirely concur with the rest of the Court, that a person who is guilty of negligence, and thereby produces injury to another, has no right to say, "Part of that mischief would not have arisen if you yourself had not been

1850.
GREENLAND
v.
CHAPLIN.

1850.
GREENLAND
v.
CHAPLIN.

guilty of some negligence." I think that where the negligence of the party injured did not in any degree contribute to the immediate cause of the accident, such negligence ought not to be set up as an answer to the action; and certainly I am not aware that, according to any decision which has ever occurred, the jury are to take the consequences and divide them in proportion according to the negligence of the one or the other party. But here I may again state, that it occurs to me there is considerable doubt,—and at present I guard myself against being supposed to decide with reference to any case which may hereafter arise; but, at the same time, I am desirous that it may be understood that I entertain considerable doubt, whether a person who is guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. Whenever that case shall arise, I shall certainly desire to hear it argued, and to consider whether the rule of law be not this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not, by the law of England, expected to anticipate and guard against that which no reasonable man would expect to occur. I beg to say that, in expressing this doubt whether the responsibility for consequential damage extends to the extreme case to which I have adverted, I am expressing my own opinion only, and not that of the rest of the Court.

Rule discharged.

1850.

POPE v. FLEMING.

April 27.

THIS was a rule calling on the plaintiff to shew cause why he should not pay to the defendant the costs of the day for not proceeding to trial pursuant to notice.

It appeared from the affidavits, that the cause was entered on the commission day for trial at the Surrey Spring Assizes, before *Wilde*, C. J. The action was on a covenant contained in the deed of settlement of a benefit building society, and the plaintiff had subpoenaed the defendant's clerk, who was the attesting witness to the deed. At the sitting of the Court on the first day, the learned Judge, according to the usual practice, commenced trying the undefended causes, and while they were being disposed of, and a few minutes before twelve o'clock, the plaintiff's attorney, not seeing the witness present in Court, requested that this cause, which stood several off in the list, might be called on, for the purpose of calling the witness on his subpoena. This was accordingly done, and the witness not appearing, the plaintiff's attorney withdrew the record, having been informed by the clerk of the Chief Justice that it might be re-entered at any time before twelve o'clock. The defendant's counsel, however, delivered to the Judge a *ne recipiatur*, on the ground that a record could not be entered after ten o'clock, at which time the Court sat. The learned Judge, on application to him, stated that, according to the practice, no record could be entered after the sitting of the Court, except by consent. The witness came into Court when the undefended causes were disposed of, and the plaintiff then offered to try at once, or that the cause should be placed at the bottom of the list. The defendant refused to accede to these proposals, and the cause was not tried. The present rule was obtained on a previous day in this term, against which

A plaintiff having entered his cause on the commission day for trial at the Assizes, on the following day caused it to be called on out of its turn, in order that a witness might be called on his subpoena. That was accordingly done, and the witness not appearing, the plaintiff withdrew the record, having been told by the Judge's clerk that he might re-enter it before twelve o'clock. The defendant then delivered a *ne recipiatur*, on the ground that a record could not be entered after the sitting of the Court, and the Judge so ruled. The witness afterwards came into Court, and the plaintiff then offered to try, or that the cause should stand at the bottom of the list, but the defendant refused:—*Held*, that the defendant was not entitled to the costs of the day, since it was through his own default that the cause was not tried.

1850.
POPE
v.
FLEMING.

Willes now shewed cause.—The plaintiff ought not to pay the costs of the day, since it was the defendant's fault that the cause was not tried. The plaintiff did all in his power to try, but the defendant refused. It would seem that the witness was purposely absent. The record was, in fact, only withdrawn conditionally, and upon a representation that it might be entered again. In *Lean v. Smyth*(a), the plaintiff having been compelled to withdraw the record, on account of the non-arrival of his witnesses at the Assizes, the Judge, on their arrival, allowed it to be re-entered.

The Court then called on

Hurlstone to support the rule.—The omission to try arose from the plaintiff's own act, and not from any fault of the defendant. The plaintiff chose to assume that the witness would not be present in Court when the cause was called on in its turn, and, upon that supposition, got it taken out of its order, and withdrew the record when it was too late to re-enter it. If the plaintiff had waited until the cause was reached in its turn, he might have tried, but, having withdrawn the record, the defendant was not bound to consent to its re-entry, contrary to the practice. In *Cook v. Smith*(b) the cause was made a remanet, and the record not having been re-sealed, the clerk to the defendant's attorney refused to consent to its being tried, and it was held that the defendant was notwithstanding entitled to the costs of the day.

POLLOCK, C. B.—The rule must be discharged. The real default was on the part of the defendant. The plaintiff withdrew the record only on the assurance of the Chief Justice's clerk that it could at the next moment be properly re-entered for trial at that Assizes. The defendant,

(a) 2 M. & Rob. 126.

(b) 1 Dowl. N. S. 861.

however, delivered a *ne recipiatur*, and the learned Judge thought that it was too late to enter the record after the sitting of the Court. All the witnesses being afterwards present, the plaintiff offered to try then, or to let the cause be placed at the bottom of the list; but the defendant refused, probably with the view of making the present motion. It was therefore in fact the fault of the defendant, and not of the plaintiff, that the cause was not tried.

1880.
 POPE
 v.
 FLEMING.

ROLFE, B.—I am of the same opinion. Whenever costs have been occasioned by or through the default of a plaintiff in not proceeding to try, after notice given and not properly countermanded, the defendant is entitled to be paid those costs. But here the plaintiff was ready and willing to try; the defendant, therefore, and not the plaintiff, was in fault.

PLATT, B., concurred.

Rule discharged, with costs.

TAYLOR v. WILSON.

April 17.

ASSUMPSIT on a bill of exchange drawn by one James Roberts upon and accepted by the defendant, and by J. Roberts indorsed to Thomas Hodgson, who indorsed to the plaintiff. Plea, non assumpsit (by statute).

A security given by a bankrupt to a creditor, on consideration of his forbearing to oppose the bankrupt's last examination, is not void under the 12 & 13 Vict. c. 106, s. 202.

At the trial, before *Patteson, J.*, at the Staffordshire Spring Assizes, it appeared that Roberts, the drawer of the bill, being bankrupt, was about to pass his final examination before the Court of Bankruptcy, when Hodgson, who was one of his creditors, threatened to oppose him; and it was thereupon agreed that the opposition should be withdrawn, upon Roberts giving to Hodgson the present and two

1860.
 TAYLOR
 v.
 WILSON.

other bills, which was accordingly done, and the bankrupt passed his final examination. There was no evidence that the plaintiff was not an innocent indorsee. It was objected, on behalf of the defendant, that the bill was void under the 12 & 13 Vict. c. 106, s. 202(a). The plaintiff's counsel submitted, that the case was not within that section, which applied only to securities given as a consideration for forbearing to oppose the allowance of the bankrupt's *certificate*; and the learned Judge being of that opinion, directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him.

Keating moved accordingly, (April 16).—The case falls within the spirit of the enactment. It is true that the words used are “allowance of the bankrupt's certificate;” but the certificate cannot be obtained unless the final examination be passed. [*Pollock*, C. B.—In a matter so highly penal, we ought not to extend the provisions of the statute by implication.] The question, with what intent the bill was given, was one of fact, which should have been submitted to the jury.

Cur. adv. vult.

POLLOCK, C. B., now said:—We have consulted with my Brother *Patteson* on the subject of this case. The defence was founded on the 12 & 13 Vict. c. 106, s. 202, by which a bill of exchange is made void if given to induce a cre-

(a) Enacts, “That any contract or security made or given by any bankrupt or other person unto or in trust for any creditor, for securing the payment of any money due by such bankrupt at his bankruptcy, as a consideration or with intent to persuade such creditor to forbear opposing, or to consent to the allowance of the bankrupt's

certificate, or to forbear to petition for the recall of the same, shall be void, and the money thereby secured or agreed to be paid shall not be recoverable, and the party sued on such contract or security may plead the general issue, and give this Act and the special matter in evidence.”

ditor to forbear opposition to a certificate. On the present occasion, the bill was given not to oppose the last examination. My Brother *Patteson* directed a verdict for the plaintiff, thinking that the statute did not apply to a case where the consideration related to the last examination, and not to the certificate. Possibly the question as to the nature of the arrangement might have been left to the jury; but we find that the point reserved was, to enter a verdict for the defendant, if the fact of the bill having been given to forbear opposition to the last examination was within the Act of Parliament. We are of opinion that it is not, and therefore there will be no rule.

1850.
TAYLOR
v.
WILSON.

Rule refused.

SIMPKINS v. POTHECARY.

April 25.

THE declaration in this case, after stating that the defendant had been summoned to answer the plaintiff, by virtue of a writ issued, in an action of *debt*, and that the plaintiff demanded of the defendant the sum of 236*l.* 10*s.*, proceeded thus:—“For that whereas the defendant, on &c., made his draft or order in writing for the payment of money called a banker’s cheque, and directed the same ‘To the Manager of the Southampton Branch of the National Provincial Bank of England,’ and thereby required the said manager to pay to the plaintiff or bearer 76*l.* 10*s.*, and then delivered the same to the plain-

A declaration, after stating that the defendant was summoned to answer the plaintiff in an action of debt, alleged that the defendant made his draft or order in writing for the payment of money called a banker’s cheque, and delivered the same to the plaintiff, who still was the bearer there-

of; that the cheque was presented at the Bank and not paid, whereof the defendant had notice, and then, in consideration of the premises, *promised the plaintiff to pay him the amount of the draft on request.* Then followed counts for goods sold and delivered, and on an account stated; concluding, “whereby, and by reason of the non-payment of the said several monies” *actio accrevit*, yet the defendant has not paid the sum above demanded:—*Held*, on motion in arrest of judgment, that the first count was a good count in debt, as the allegation of the promise might be rejected as surplusage.

Debt will lie against the maker of a banker’s cheque, by the payee to whom the maker has delivered it.

1850.
 SIMPKINS
 v.
 POTTERBARY.

tiff, who still is the bearer thereof; and the said manager of the Southampton Branch of the National Provincial Bank of England did not pay the said cheque, although the same was then presented to him, whereof the defendant then had due notice; and the defendant then, in consideration of the premises, promised the plaintiff to pay him the amount of the said draft or order when he the defendant should be thereunto afterwards requested. And whereas the defendant afterwards, to wit, on &c., was indebted to the plaintiff in a large sum of money, to wit, 80*l.*, for goods then sold and delivered by the plaintiff to the defendant at his request, and in 80*l.* for money found to be due from the defendant to the plaintiff on an account then stated between them, which said last-mentioned several monies were to be respectively paid by the defendant to the plaintiff on request; whereby, and by reason of the non-payment of the said several monies, an action hath accrued to the plaintiff to demand and have of and from the defendant the said several monies respectively, making together the said sum above demanded. Yet the defendant has not paid the said sum above demanded, or any part thereof; to the plaintiff's damage of 10*l.*; and therefore he brings his suit," &c.

The defendant pleaded to the first count, a denial of the making of the cheque, and to the residue of the declaration, *nunquam indebitatus*.—Issues having been joined thereon, and a verdict found for the plaintiff, a rule nisi was obtained to arrest the judgment, on the ground that debt would not lie on such a cheque; and that, if it would, the first count was in substance a count in *assumpsit*.

J. S. Douglas now shewed cause.—Debt will lie wherever there is a privity of contract between the parties: *Watkins v. Wake*(a), *Stratton v. Hill*(b). [*Parke, B.*—In *Bishop*

(a) 7 M. & W. 488.

(b) 3 Price, 253.

v. Young (a), Lord *Eldon* held, that debt will lie by the payee against the maker of a promissory note expressed to be for value received.] *Hatch v. Trayes* (b) decided that, as between the immediate parties, debt will lie though the instrument do not express that it is for value received, or for any consideration. A cheque on a banker is analogous to a bill of exchange payable on demand to the order of the drawer. It is an admission, and *prima facie* evidence of a debt due from the maker to the payee.

1850.
 SIMPKINS
 v.
 POTTERYARY.

With respect to the other objection, if the promise in the first count be struck out, sufficient will remain to constitute a good count in debt: *Cloves v. Williams* (c), *Compton v. Taylor* (d). The general conclusion of the declaration contains a good breach in debt: *Esdaile v. Maclean* (e). *Brill v. Neale* (f) is distinguishable, for there the count commenced as in debt, but concluded with a breach in assumpsit. [Parke, B.—*Dalton v. Smith* (g) is inapplicable: there Lord *Ellenborough*, C. J., said, "Here are no words of debt in this declaration; it cannot be good, unless every bad count in assumpsit is to be considered as a good count in debt."] The declaration might have been specially demurred to for ambiguity, but it is good after verdict.

Barstow, in support of the rule.—If the first count be read as if it were the only one, *Dalton v. Smith* and *Brill v. Neale* are authorities to shew that it is framed in assumpsit. [Pollock, C. B.—If it be taken as a count in assumpsit, there is no breach.] *Smith v. Cox* (h) shews that the allegation of a promise cannot be rejected. The Court there said, "Unless a promise be alleged in declarations on bills of exchange, there will be nothing to distinguish

(a) 2 Bos. & P. 78.

(b) 11 A. & E. 702.

(c) 3 Bing. N. C. 868.

(d) 4 M. & W. 138.

(e) 15 M. & W. 277.

(f) 3 B. & Ald. 208.

(g) 2 Smith, 618.

(h) 11 M. & W. 475.

1850.
SIMPKINS
v.
POTHEGARY.

the action of assumpsit from that of debt; and from aught that appears here, there being no promise alleged, there might be a misjoinder of counts on the record." In *Cloves v. Williams* the point was not decided, the parties having been allowed to amend.

PARKE, B.—If the allegation of a promise can be rejected as surplusage, there will be a complete count in debt, for the count is right in every respect except this statement of a promise to pay. Then we have only to see if there is any authority for our doing so reasonable a thing; and we find one in the case of *Cloves v. Williams*. It is true that case went off on an amendment, and is therefore of less authority than if solemnly decided by the Court; but the same may be said of *Brill v. Neale*. There *Tindal*, who was counsel for the plaintiff, prayed leave to amend, on a representation being made that the case of *Dalton v. Smith* was in point against him. Now, in that case, which is only reported in *Smith's Reports*, it was not averred that the defendant was indebted to the plaintiff at all, but merely that, in consideration that the plaintiff had sold the defendant's goods, the defendant promised to pay for them, whereas in *Brill v. Neale* it was expressly stated that the defendant was indebted to the plaintiff. It is evident, therefore, that the amendment was applied for under a mistaken notion of the case of *Dalton v. Smith*. Then, on the other hand, we have the authority of *Cloves v. Williams*, which if not exactly in point, is at least sufficient to justify a thing so plainly consistent with common sense. With respect to the other objection, there is no doubt that debt will lie, for the plaintiff received the cheque from the defendant, so that there is a privity between them.

POLLOCK, C. B., ROLFE, B., and PLATT, B., concurred.

Rule discharged.

1850.

LEVY v. HORNE.

April 27.

THIS was a rule calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the Sheriff of Middlesex upon a *ca. sa.* issued in this cause, on the ground that he had obtained a protection from arrest under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.

The action was brought on a bill of exchange drawn by one Lawrance upon, and accepted by the defendant on the 1st of November, 1849, for payment of 50*l.* two months after date. On the 24th of November the defendant petitioned the Court of Bankruptcy under the "arrangement clauses" of the 12 & 13 Vict. c. 106, and served on Lawrance, the drawer of the bill, the notices required to be given to creditors. On the 30th of January, 1850, an arrangement was come to between the defendant and three-fifths of the creditors (not including Levy the plaintiff), and on the same day the Court granted the defendant a certificate of protection from arrest^(a), under the 216th section. On the 7th of March the present action was

The certificate given to a petitioning trader, under the 12 & 13 Vict. c. 106, s. 216, only protects him from arrest at the suit of persons being creditors at the date of the petition, and who have received the notices required by that Act.

Therefore, where the acceptor of a bill of exchange petitioned under the arrangement clauses of that Act, and gave the requisite notice to the drawer, whom he supposed to be the holder of the bill:—*Held*, that the certificate did not protect him from execution on a judgment in an action by an indorsee of the bill.

tect him from execution on a judgment in an action by an indorsee

(a) The certificate of protection was as follows:—"Whereas the said William Horne, being a trader unable to meet his engagements with his creditors, and desirous of laying the state of his affairs before me, did on the 24th of November, 1849, present his petition to this honourable Court pursuant to the above-mentioned Act. And whereas the said petitioner did duly file in Court, in manner directed by the said Act, the account by the said Act ordered to be filed, and did therein

set forth a proposal for the future payment of his debts and engagements, and he has been duly sworn to the truth of such accounts. And whereas such private sittings as by the said Act are required, have been duly held. And whereas a certain resolution or agreement has been made which the Commissioner acting in the matter of the said petition thinks reasonable and proper to be executed under the superintendence and control of the Court, and on approving and con-

1850.

LEVY
v.
HORNE.

commenced, and on the 28th, judgment was signed for want of a plea. No notice whatever was given to the plaintiff, as required by the statute. The defendant's affidavit stated, that at the time he presented his petition and the notices were given to the creditors, he believed that Lawrance held the bill, and that he did not know, until this action was brought, that the plaintiff or any other person was the holder of it. The affidavit also stated circumstances to lead to the inference that the bill was indorsed to the plaintiff after Lawrance received notice of the petition, and that the plaintiff was suing for him. The plaintiff's affidavit stated numerous facts, with the view of shewing that the defendant, at the time of petitioning, was aware that the plaintiff was the holder of the bill. It did not appear when the bill was indorsed to the plaintiff. The present rule was obtained on the authority of *Reeves v. Lambert*(a).

Watson and Hawkins shewed cause.—The defendant is not entitled to be discharged. Under the "arrangement clauses" in the Bankrupt Act, 12 & 13 Vict. c. 106(b), a

firming the same, had caused the same to be filed and entered of record therein: I do hereby certify the same. E. HOLROYD, Commissioner.—The within-named William Horne is hereby protected from arrest at the suit of any person being a creditor at the date of the within-mentioned petition, and having had such notice as by the within-mentioned Act is required, until the 29th of May, 1850: provided that this protection shall not be valid in favour of the said William Horne if he shall be proved to have been about to abscond beyond the jurisdiction of this Court, or if he has concealed, or is concealing any part of his estate and effects; nor against any creditor whose

debt is not truly specified in the account filed by such petitioner; nor against any creditor whose debt has been contracted by reason of any manner of fraud or breach of trust. EDWARD HOLROYD, Commissioner."

(a) 4 B. & C. 214.

(b) The following sections were referred to:—Section 213. "That forthwith after the granting of any order for protection, the Court shall appoint a private sitting, to be held at such time and place as it may name, and shall at the same time appoint an official assignee to act in the matter of such petition, and upon sufficient cause shewn may, if it shall think fit, direct that the estate and effects of the petition-

petitioning trader is only protected from arrest at the suit of persons being creditors at the date of the petition, and

1850.

LEVY

v.

HORN.

er, or any part thereof, shall be possessed and received by such official assignee, or be taken possession of by the messenger of the Court; and all stock, monies, and other effects of the petitioner shall be transferred, delivered, and paid by the official assignee into the Bank of England, to the credit of the Accountant in Bankruptcy, to be subject to the like rule and regulation for the keeping the account of the said monies and other effects, and for the payment and delivery in, investment and payment and delivery out of the same, as in bankruptcy; and the Court shall have power to examine on oath such petitioner or any witness produced by him, or any creditor or person claiming to be a creditor of such petitioner, and to adjourn such private sitting, or any subsequent private sitting, from time to time as it shall think fit; and notice of such private sitting shall be given in writing to every creditor, not less than fourteen days before the same is held, such notice to be sent by post, addressed to every creditor at his last known place of business or residence."

Section 214. "That such petitioning trader shall, ten days before the day appointed for the private sitting of the Court, file in Court, and in such form as may by any rule or order to be made in pursuance of this Act be directed, a full account of his debts, and the consideration thereof, and the names, residences, and occupa-

tions of his creditors, and also a full account of his estate and effects, whether in possession, reversion, or expectancy, and of all debts and rights due to or claimed by him, and of all property of what kind soever held in trust for him, and shall therein set forth such proposal as he is able to make for the future payment, or the compromise of such debts or engagements, and shall furnish the official assignee with a copy of such account."

Section 215. "That at the private sitting of the Court, appointed in manner hereinbefore mentioned, or at any adjournment thereof, the creditors shall prove their debts (such proofs to be in all respects as proofs in bankruptcy), and the petitioning trader shall attend and make oath of the truth of the account filed by him, and may be examined thereon; and if at such sitting, or at any adjournment thereof, three-fifths in number and value of the creditors who have proved debts to the amount of 10% shall assent to the proposal of such petitioner, or to any modification thereof, the Court shall appoint another private sitting for the confirmation of such proposal, or modified proposal, and such second sitting shall be held not earlier than fourteen days from the first sitting, and notice thereof in writing shall be personally served on every creditor who was not present by himself or his appointed agent at such first sitting,

1850.

LEVY

v.

HORNE.

who have received the notices required by the statute. The case of *Reeves v. Lambert* (a) has no application. That

seven clear days at least before the day appointed for such second sitting: provided always, that the Court, if it shall think fit, may make order in any special case, that service of such notice at the last known place of abode or business of any creditor shall be deemed good service."

Section 216. "That at such second sitting, or at any adjournment thereof, the creditors may also prove their debts, and if three-fifths in number and value of those who have proved debts to the amount of 10*l.* shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same; and such resolution or agreement (subject to such confirmation as is hereinafter mentioned), shall thenceforth be binding and of full force, as well against such petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the said several sittings of the Court; and the Court, if it shall think the same reasonable and proper to be executed, after hearing such creditors by themselves, their counsel, or attornies, as may desire to be heard either for or against such resolution or agreement, shall approve and confirm the same, and cause it to be filed and entered of record; and shall grant to the petitioner a certi-

ficate of the filing and entering of record of such approval and confirmation; and shall from time to time indorse on such certificate a protection from arrest; and such petitioner shall be free from arrest at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid; and any officer arresting such petitioner at the suit of any such creditor, and on sight of such certificate and protection not releasing such petitioner, shall be liable to such penalty as is provided respecting bankrupts in the like case: provided, however, that no such protection shall be valid in favour of any such petitioner who shall be proved to have been about to abscond beyond the jurisdiction of the Court, or who has concealed, or is concealing any part of his estate or effects; nor against any creditor whose debt is not truly specified in the account filed by such petitioner; nor against any creditor whose debt has been contracted by such petitioner by any manner of fraud or breach of trust."

Section 221. "That, so soon as the said resolution or agreement shall have been carried into effect, and the creditors of such petitioning trader shall have been satisfied according to the tenor thereof, the Court shall give to such petitioner a certificate under the hand and seal

(a) 4. B. & C. 214.

1850.
 LEVY
 v.
 HORNE.

was decided on the Insolvent Act, 1 Geo. 4, c. 119, s. 6, by which a prisoner was discharged as to all debts mentioned in his schedule; and the question there was, whether a statement in the insolvent's schedule, that he was indebted to A. for goods, and that A. held his acceptance for the amount, was a true description of the person to whom he was indebted, within the meaning of that statute, the fact being, that a third party was the holder of the bill, but the insolvent did not know it. In this case it does not appear that the plaintiff was a creditor of the defendant at the date of his petition; and even if he were, he has received no notice. It was suggested, that the plaintiff was acting in collusion with Lawrance; but that is answered by the affidavits. The proceedings under the "arrangement clauses" being strictly private, there is reason why these notices should be required. The 12 & 13 Vict. c. 106, contains no provision similar to that in the Insolvent Act, 1 & 2 Vict. c. 110, s. 75, enabling the insolvent to describe in his schedule the holder of an outstanding bill of exchange as unknown; and *Beck v. Beverley* (a) shews that, under that statute, unless such state-

of the Commissioner, in the form contained in schedule A c to this Act annexed, setting forth the filing of the petition, the resolution or agreement of the creditors, and that the said resolution or agreement has been fully carried into effect; and such certificate shall thenceforth operate to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy, except only that any debt which shall have been contracted wholly or in part by reason of any manner of fraud or breach of trust, or without reasonable pro-

bability at the time of contract, of being able to pay the same; or by reason of any judgment in any prosecution for breach of the revenue laws; or in any action for breach of promise of marriage, seduction, criminal conversation, libel, slander, assault, battery, malicious arrest, malicious trespass, maliciously suing out a fiat in bankruptcy, or maliciously filing or prosecuting a petition for adjudication of bankruptcy, shall not be barred by such certificate."

(a) 11 M. & W. 845.

1850.
 LEVY
 v.
 HORN.

ment be inserted, the holder is not deprived of his right to sue. The 12 & 13 Vict. c. 106, does not prohibit the holder of a bill of exchange from indorsing it after notice of a petition; and if this protection affords any defence as against the present plaintiff, it should have been pleaded: *Denne v. Knott*(a).

Martin, in support of the rule.—It is conceded, that the certificate of protection, if a defence to the action, ought to have been pleaded; but it is evident, from the 216th section, that it is a protection from arrest only. The intention of the legislature was, that the holder of a negotiable security should not indorse it over after notice of the petition. The 12 & 13 Vict. c. 106, must be construed in analogy with the 1 & 2 Vict. c. 110. The property of the defendant having vested in the official assignee, and the defendant having given such notice as was in his power, he is entitled to protection from arrest at the suit of all persons being creditors at the date of the petition. *Reeves v. Lambert* is an authority to shew that it is sufficient for an insolvent debtor to insert in his schedule the best description he can give of the persons to whom he is indebted. Unless the same construction be put upon the "arrangement clauses" in the 12 & 13 Vict. c. 106, no effect can be given to them as regards negotiable securities. The intention of the legislature is apparent from the enactments, that the proof of debts shall be, in all respects, as proofs in bankruptcy: sect. 215; and that the final certificate shall operate as if it were a certificate of conformity under a bankruptcy: sect. 221. [He then commented on the affidavits, and argued that the action was in fact brought by Lawrance in the name of Levy.]

POLLOCK, C. B.—The rule ought to be discharged. The

(a) 7 M. & W. 143.

1850.
LEVY
v.
HORNE.

ground of the application is, that the defendant is within the protection of the 12 & 13 Vict. c. 106, and is therefore entitled to be free from this arrest, it being at the suit of a creditor who has had the notices prescribed by that statute. There can be no doubt that, taken in their literal sense, the plaintiff does not come within the words of that section; for it is not suggested that he had any notice whatever. We are bound to give a reasonable effect to all that appears to us to have been the meaning of the legislature, and to disclaim any notion that we are to find fault with the statute, and avoid what seems to us its genuine operation, because certain difficulties may occur. If, indeed, it had been satisfactorily made out that Lawrance had transferred this bill to Levy, with express notice that it was no longer of any use to Lawrance, inasmuch as he had received notice of the acceptor's intention to take the benefit of the statute, I own that I should have been disposed to hold the case within the Act, and to discharge the defendant out of custody, though I am not sure that I should have had the entire concurrence of the rest of the Court. But that point does not arise; because, although there is much in the way in which the application is met, which gives rise to suspicion that the plaintiff has something to conceal, seeing that he is unable to state distinctly the day on which he got the bill, it being important for him to shew that he got it before the defendant's application to the Court, there is, nevertheless, some ground for argument that he got it before the 24th of November, on which day the defendant presented his petition. The passage in the plaintiff's affidavit which made some impression on me was that in which he states that the defendant was well acquainted with the fact that the plaintiff was the holder of the bill in question, and that it was a trick in not giving him notice, so that he should not oppose him. Coupling that statement with other matters, there is so much doubt about that part of the case, that I

1850.

LEVY

v.

HORN.

cannot come to any satisfactory conclusion that Levy is really a mere representative of Lawrance, and that the action is brought for the benefit of Lawrance. It would be in vain to refer that inquiry to the Master, since he has not any peculiar means of getting at the facts, and the parties would soon incur more expense than the amount of the bill. We must therefore decide this question on the words of the statute, and the facts which the affidavits disclose; and, taking all the affidavits together, it is not made out that this arrest was at the suit of a person who was a creditor of the defendant at the date of his petition, and who had the several notices required by the statute to be given to such creditors. Consequently, the foundation of the application fails, and the rule must be discharged.

ROLFE, B.—I am of the same opinion. Now that the matter has been fully considered, I confess I do not see why it may not have been the deliberate intention of the legislature, that a trader who petitions under these arrangement clauses should only be entitled to the same protection from arrest as in bankruptcy. There is no injustice done; when the proper time comes, he may obtain his certificate, and so get his discharge. But on that point it is not necessary to give an opinion. The late Bankrupt Act, adopting the powers of "arrangements" of previous Acts, provides that, instead of going through the expense of a fiat in bankruptcy, a trader may make an arrangement with his creditors, to a certain extent private, but which is to have the effect of a legal discharge, with the consent of a proportion of the creditors. The present defendant, wishing to avail himself of that branch of the Bankrupt Act, on the 24th of November presented a petition in the mode there pointed out, and verified by affidavit as the Act requires, stating the amount of his property and debts. Then the Act goes on to direct that

the petitioner shall make out a list of his creditors, and give them notice a certain time before entering into the arrangement. Amongst other creditors, the defendant gave notice to a person to whom he knew, or at least supposed, himself indebted in respect of the bill of exchange in question, that is, Lawrance, whom he thought the holder of the bill. Then the Act goes on to say that two meetings of creditors shall take place, at the second of which fresh creditors may come in and prove their debts; then the proposed arrangement is reduced into form, and without further proceedings may or may not be adopted, and, if finally adopted, has the effect of a certificate of conformity in bankruptcy. But in the meantime, to exonerate the person of the debtor, it is provided, that if three-fifths in number and value of the creditors agree to accept the proposal, such resolution or agreement (subject to confirmation) shall be binding, as well against the petitioning trader as against all persons who were creditors at the date of his petition, and who had notice of the several sittings of the Court; and a certificate is to be given to the trader which shall protect him from arrest "at the suit of any person being a creditor at the date of his petition, and having had such several notice or notices as aforesaid." The object of the present application is to discharge the defendant out of custody on the ground that he has obtained such protection; and in order to see whether he is entitled to be discharged, the sole point of inquiry is, whether the party who holds him in custody was a creditor at the date of the petition, who had received such notices. Now the person who holds him in custody is Levy the plaintiff, and it is not pretended that any notice was given to Levy. The only contention was, whether the notice to Lawrance was notice to Levy. That might be so if Lawrance and Levy were colluding together to deceive the Court; but that is not made out. When the rule was moved for, the point which pressed on my mind

1850.

LEVY
v.
HORNE.

1850.

LEVY
v.
HORNE.

was this: that either Levy was the holder of the bill at the date of the petition, or if not, that he had become the holder by subsequent indorsement. But in neither case is the defendant entitled to be discharged. If Levy was the holder when notice was given to Lawrance, *cadit questio*, and if Lawrance was the holder at the time of notice, and the bill was afterwards indorsed to Levy, the case does not come within the Act; therefore, as against Levy, there is no ground for the application. *Reeves v. Lambert* has no bearing on the present case. The Insolvent Debtors Act, 1 Geo. 4, c. 110, s. 6, provided that the insolvent should make out a schedule of his debts, and of all persons whom he had reasonable ground for supposing had claims upon him. When he had done that he was discharged, not against those persons only whom he supposed to be creditors, but against all persons; and the question there was, whether the acceptor of a bill of exchange, which had been indorsed over, having inserted the name of the drawer in his schedule as his creditor for the amount of the bill, had not done all that the 6th section of that statute required him to do; and the Court held that he had; and then the 16th section discharged him as against all the world. The question therefore comes to the point from which I started, namely, whether Levy was a creditor at the date of the petition, and had such notices as the Act requires; and that is not made out: consequently, the rule ought to be discharged.

PLATT, B.—I am also of opinion that the rule ought to be discharged. It is perfectly plain, that, under the 216th section, the persons who resolve and agree to accept the proposal of the petitioner are those creditors who exist in that character, and have received the required notices. Then the section provides, that “such petitioner shall be free from arrest at the suit of any person being a creditor

at the date of his petition, and having had such several notice or notices as aforesaid," and that shews that the protection is to be co-extensive with the obligation on the creditor to be bound by the resolution and agreement. That view is fortified by the 221st section, which enables the Court to give the petitioner a certificate "so soon as *the said resolution and agreement* shall have been carried into effect." Consequently, if the plaintiff was not a creditor at the time the petition was presented, the statute does not apply: if he was a creditor, he ought to have had notice. Even if the action were brought in the name of Levy, for the benefit of Lawrance, it might be a question whether the defendant would be entitled to be discharged; but it is not necessary to decide that point.

Rule discharged.

1850.

LEVY

v.
HORN.

MAIS v. M'NAMARA.

April 30.

TROVER for bales of flax.—Plea, that the plaintiff, after the conversion, had petitioned the Court for Relief of Insolvent Debtors; and that, by an order of the said Court, all his estate and effects were vested in the provisional assignee of the said Court. Replication, that the plaintiff never had any property or interest or right or title to the said goods, except as trustee for one Jabez Millard; and that he has commenced and is prosecuting this action as a trustee, for and for the use and benefit of the said Jabez Millard, and not for his the plaintiff's own use and benefit. Thereupon an application was made by summons to *Alderson*, B., at Chambers, for an order that the plaintiff should give security to the defendant for his costs in this action; and the learned Judge, after hearing the attornies, indorsed the summons thus: "Order.—Let the party really claiming make him-

A Judge's order directing the real plaintiff, in an action brought by a nominal plaintiff, who is insolvent, to make himself responsible for the defendant's costs therein, is wrong, and ought to be amended; as the defendant is, in such case, entitled to security for his costs to the satisfaction of the Master.

1850.
 MAIS
 v.
 M'NAMARA.

self responsible for the costs." The defendant's attorney then obtained a summons for amending the last-mentioned indorsement, by striking out all of it except the word "Order." At the hearing of this second summons, *Alderson*, B., refused to vary his indorsement, except by adding to it the words "by becoming the security himself;" but he gave leave to the defendant to apply to the Court. Whereupon

Keane obtained a rule calling on the plaintiff to shew cause why the order of *Alderson*, B., should not be amended by striking out the words "Let the party really claiming make himself responsible for the costs." He cited *Youde v. Youde* (a). Against this rule

Cowling shewed cause.—The order of the learned Judge places the defendant in the same position in which he would have been if the real plaintiff had sued. In that case there would have been, in the event of failure, a remedy against the real plaintiff, but he could not have been made to give security for costs. [*Pollock*, C. B.—Do you say that a pauper has a right to sue in the name of another person, and then insist that his own security for the payment of the costs shall be sufficient?] The defendants are defending for other persons. [*Pollock*, C. B.—That is quite immaterial.] The cases of *Wray v. Brown* (b), and *Perkins v. Adcock* (c), are an answer to this application. In *Chitty's Archbold*, p. 1233, it is said, that when another person is in fact proceeding with an action in the name of the party on the record, and this party is in a state of pauperism and insolvency, the Court will, by staying the proceedings, compel him for whose benefit the action is proceeding to come in and give security. [*Rolfe*, B.—Does it add, by giving security himself?] That is the meaning. [*Pollock*, C. B.—I differ from you entirely; the meaning

(a) 3 A. & E. 311.

(b) 6 Bing. N. C. 271.

(c) 14 M. & W. 808.

is, that he shall come in and give security to the satisfaction of the Master.] The case of *Elliot v. Rendrick* (a) was one in which the giving any security whatever was resisted. [*Pollock*, C. B.—The case of *Perkins v. Adcock* governs this.] That case does not decide that a Judge may not, if he shall so think fit, limit the security to that of the real plaintiff. [*Pollock*, C. B.—I think it does. *Platt*, B.—It shews that this defendant is entitled to security according to the course of the Court.

1850.
MAIS
v.
M'NAMARA.

Keane appeared to support the rule, but was not called upon.

PER CURIAM.—The rule must be absolute.

Rule absolute.

(a) 12 A. & E. 597.

KAYE v. BRETT and Another.

May 8.

DEBT for goods sold and delivered.—Plea, payment in satisfaction. At the trial, before *Patteson*, J., at the Yorkshire Summer Assizes, 1849, it appeared that the action was brought to recover 94*l.* 3*s.* for goods sold by the plaintiff to the defendants, under the following circumstances:—W. Kaye, the plaintiff's son, carried on the business of a woollen cloth merchant at Huddersfield until the month of October, 1847, when he compounded with his creditors. On the 30th of October, 1847, the plaintiff, who had made advances to W. Kaye upon the security of a warrant of attorney, issued execution thereon, and took possession of W. Kaye's stock in trade, &c. in

Goods were left by the plaintiff in the warehouse of E. & Co., at Huddersfield, for sale. The defendant, who resided in London, purchased a parcel of the goods, and remitted the price to the plaintiff. The defendants having afterwards purchased some more of the goods, received a letter from T., the clerk of E. &

Co., inclosing an invoice and purporting to be written by E. & Co., by the procuration of the plaintiff, stating that they were authorised by the plaintiff to receive payment for him, and requesting the defendant to remit the money to them. The defendant accordingly remitted the amount by cheque, inclosed in a letter addressed to E. & Co., and which was delivered at their counting-house; but T. intercepted the letter, and appropriated the money to his own use. T. had authority from the plaintiff to receive money paid over the counter for goods sold in the warehouse, but in no other way:—*Held*, that the receipt by T. was no payment to the plaintiff.

VOL. V.

T

EXCH.

1850.
KAYE
v.
BRETT.

his warehouse. Shortly afterwards, the plaintiff let the warehouse to Earnshaw, Hinchliffe, and Co., and arranged with their salesman to sell his goods. One H. Tozer, who had been in the employ of the plaintiff's son as a book-keeper, remained in the warehouse as book-keeper to Earnshaw & Co. The plaintiff, who was a builder, very seldom came to the warehouse; but a book was kept by Tozer, in which he entered the sale of the plaintiff's goods; he also made out invoices, and was accustomed to receive money paid over the counter for goods sold in the warehouse. The defendants carried on business as woollen warehousemen in London; and in December, 1848, H. Brett, one of the defendants, being at Huddersfield, called at the warehouse of Earnshaw & Co., and purchased some of the plaintiff's goods, to the amount of 30*l.* 7*s.* 3*d.* On the 1st of February, 1849, the defendants received the following letter, containing a statement in reference to these goods:—

"Gentlemen,—I beg to hand the above small account, which I trust you will find correct. A cheque for amount in course will oblige, gentlemen, your most obedient servant,
JOSEPH KAYE, pro. H. TOZER.

"P.S.—Please address, care of Earnshaw, Hinchliffe & Co."

The amount was accordingly remitted by letter addressed to the plaintiff, and inclosing a cheque having a blank for the name of the person to whom it was payable. The receipt of the cheque was acknowledged by a letter, of which the following is a copy, the initials "H. T." being those of Tozer:—

"Huddersfield, 10th February, 1849.

"Gentlemen,—I beg to acknowledge the receipt of cheque, value 29*l.* 12*s.*, for which am obliged.—Gentlemen, your most obedient servant, Pro. JOSEPH KAYE, H. T."

In the month of February H. Brett again called at the warehouse of Earnshaw & Co., and purchased goods belonging to the plaintiff, to the amount of 94*l.* 3*s.* On the 22nd of February the defendants received an invoice of the last-mentioned goods, and a letter, of which the following is a copy:—

1860.
KAYE.
v.
BRETT.

“Gentlemen,—The goods herewith are forwarded this morning, and trust will open to your satisfaction. Your further favours will oblige, gentlemen, your most obedient servant,
Pro. JOSEPH KAYE, H. TOZER.”

On the 15th of March, 1849, the defendants received a statement and letter, of which the following is a copy:—

“Gentlemen,—Mr. Kaye wishes us to say, that he should not have written for payment, but that he understood from Mr. Atkinson that he could have the money whenever he applied for it; and as he is now much pressed for some large payments, he would allow you an extra discount, say 3 per cent. instead of 2½, if you would be kind enough to send us a cheque for him. We are, gentlemen, your most obedient servants,

“Pro. EARNSHAW, HINCHLIFFE & Co., H. TOZER.”

The defendants wrote in reply a letter addressed to Earnshaw, Hinchcliffe & Co., offering to pay the sum due to the plaintiff on being allowed an additional 2½, say 5 per cent. on the amount of the statement; and at the bottom of that letter was the following memorandum in the handwriting of the defendants' clerk:—“Goods, 94*l.* 3*s.*; claims, 7*s.* 6*d.*; 5 per cent., 4*l.* 14*s.*—5*l.* 1*s.* 6*d.* 89*l.* 1*s.* 6*d.*”

The defendants received in answer the following letter:

“Huddersfield, 16th March, 1849.

“Gentlemen,—In reply to your favour of the 15th inst., Mr. Kaye desires us to say, that he thinks you are very

1850.

KATE

v.

BENT.

hard upon him; but, as stated in our last, he is in want of the money. You will therefore please to hand us a cheque per return of post. We cannot say anything about the returns until we see Mr. B. We are, gentlemen, your most obedient servants,

“PRO. EARNSHAW, HINCHLIFFE & Co., H. TOZER.”

On the 17th of March, the defendants remitted a cheque for 89*l.* 1*s.*, in a letter addressed to Messrs. Earnshaw, Hinchliffe & Co., Huddersfield, and which was delivered at their counting-house. This letter was intercepted by Tozer, who took the cheque to a bank in Huddersfield, and having obtained cash for it absconded. The learned Judge told the jury, that the only question was, whether the payment to Tozer was payment to the plaintiff, and that depended upon whether Tozer was authorised to receive payment in cheques, and if so, they should find for the defendants. A verdict having been found for the defendants, in last Michaelmas Term a rule nisi was obtained to set aside the verdict, and for a new trial, on the ground of misdirection, against which

Cleasby shewed cause in the following Hilary Vacation (February 8). This case falls within the principle laid down in *Story on Agency*, s. 127, note 2, viz., that “the principal is bound by all acts of his agent within the scope of the authority which he holds him out to the world to possess, although he may have given him more limited private instructions unknown to the persons dealing with him.” That doctrine is founded on the public policy of preventing frauds on innocent persons, and the encouragement of confidence in dealings with agents. In this case, if the cheque had been sent to Tozer, that would have been a valid payment; so that the money has in fact come to the hands of a person authorised to give a discharge; and it is immaterial in what way he got pos-

session of it. [*Parke, B.*—If a shopman is accustomed to receive money over the counter, payment to him binds the principal, for there is a representation to all the world that the agent is authorised to receive money in the shop; but that does not import an authority to receive money in any other way. *Alderson, B.*—If the plaintiff had directed the defendants to pay the money to a banker, and the defendants had done so, that would have been a good payment; but here the plaintiff gave no direction that the money should be paid to Earnshaw & Co. on his account.] The defendants paid the money in the ordinary course of business, and Tozer, as the agent of Earnshaw & Co., was as much authorised to receive it, as if the defendants had gone to the warehouse and paid him. [*Parke, B.*—It is as if the money had been sent by a messenger to Earnshaw & Co., and Tozer had robbed the messenger.] If the defendants had gone to the warehouse and asked for Tozer in order to pay him, and a person had come forward and represented himself as Tozer, payment to such person would have been good: *Barrett v. Deere (a)*. There was no negligence on the part of the defendants, for it is the universal practice of men in business to trust to letters written by clerks.

Watson and Hugh Hill, in support of the rule.—This was a payment, in fact, to Earnshaw & Co. on behalf of the plaintiff. The defendants could not sue Tozer for this money as received to their use, because he was only the agent of Earnshaw & Co. The defendants never intended to pay Tozer, and he is in the same situation as any third person who might have stolen the letter. The circumstance of his letters being signed “per procuration,” was sufficient notice to the defendants, and imposed upon them the duty of ascertaining the extent of Tozer’s au-

1850.

KAYE

v.

BRETT.

(a) Moo. & M. 200.

1850.

KAYE

v.

BARR.

thority: *Attwood v. Munnings (a)*, *Alexander v. Mackenzie (b)*. It does not appear from the correspondence that there was any implied authority to Tozer to receive the money; but the defendants treat him as merely representing Earnshaw & Co.

Cur. adv. vult.

PARKER, B., now said (after stating the facts):—The question is, whether on these facts the receipt of the money by Tozer discharged the defendants. We are clearly of opinion that it did not. Earnshaw & Co. were not authorised to receive the money, and the statement of Tozer to that effect, in the name of Kaye, was false, and therefore the remittance of the money to and the receipt at the counting house of Earnshaw & Co. was no payment; nor did the defendants mean to pay the money to Tozer, nor was Tozer authorised to receive it in the way in which it was remitted. The receipt, therefore, by Tozer was not a good payment by the defendants to Kaye. If a shopman, who is authorised to receive payment over the counter only, receives money elsewhere than in the shop, that payment is not good. The principal might be willing to trust the agent to receive money in the regular course of business in the shop, when the latter was under his own eye, or under the eyes of those in whom he had confidence, but he might not wish to trust the agent with the receipt of money elsewhere. We think that in this case the payment was not good, and that the defendants must suffer from the fraud of Tozer; and consequently, the rule will be absolute.

Rule absolute.

(a) 7 B. & C. 278.

(b) 6 C. B. 766.

1860.

BRISTOW v. SEQUEVILLE.

May 7.

ASSUMPSIT to recover back 200*l.* paid by the plaintiff to the defendant, for certain shares in a projected Company for working mines in Westphalia, called "The Duisburg Iron Company." The declaration set out an agreement, whereby the purchase-money was to be paid by three instalments; and in case the Company should not be finally constituted within six months, or, having been constituted, should be afterwards abandoned, the purchase-money was to be refunded, and the plaintiff to deliver up the stamped receipts to be given by the defendant, on payment of the instalments. It then averred the payment of the instalments, and giving of the receipts, and that the Company was not finally constituted within six months; and alleged as a breach, that the defendant refused to refund the purchase-money.

The defendant pleaded (*inter alia*) a denial of the payment of the purchase-money, and also that the Company was finally constituted within six months.—Issues thereon.

At the trial, before *Alderson*, B., at the London Sitings in the present term, the plaintiff proposed to prove the payment of the purchase-money by certain receipts, which had been given at Cologne, in Prussia, and bore no stamp. It was objected, on behalf of the defendant, that, by the law in force at Cologne, these receipts would be inadmissible in the Courts of that country, for want of a stamp, and consequently could not be admitted here. The learned Judge ruled, that the onus was on the defendant to prove that by the foreign law the receipts required a stamp; and for that purpose, a Dr.

A witness, whose knowledge of the law of a foreign country is derived solely from his having studied it at an university in another country, is incompetent to prove what the law of that foreign country is.

A document which, by the law of a foreign country, is not admissible in evidence, for want of a stamp, may, nevertheless, be admitted in this country. But where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here.

In order to prove that a certain Company for working mines in Westphalia had never been finally constituted, the plaintiff proved by the solicitor of the Company in this country, that nothing had been done here towards its final constitution:—*Held*, that in the absence of any evidence on the part of the defendant, the jury were war-

ranted in finding that the Company never was finally constituted.

1850.
BRISTOW
v.
SEQUENVILLE.

Boch was called as a witness, who stated that he was a jurisconsult, and adviser to the Prussian consul in England; that he knew the Code Napoleon, which was produced, was in force at Cologne; and that, by that Code, these receipts would be inadmissible in the foreign Courts, because unstamped; that he had studied law at the University of Leipsic, and from his studies there was able to speak as to the Code Napoleon being the law of Cologne. The learned Judge admitted the receipts in evidence, expressing his opinion, that the foreign law was not sufficiently proved, and that, even if proved, it would not render the receipts inadmissible in England. In support of the allegation, that the Company was not finally constituted, the plaintiff called a person who acted as solicitor of the Company in this country, who proved that nothing had been done in England towards its final constitution. No evidence in answer was given by the defendant. The learned Judge left it to the jury to say whether, in the absence of such evidence, they were satisfied, from the evidence on the part of the plaintiff, that the Company was not finally constituted; and the jury having found a verdict for the plaintiff,

Scotland now moved for a new trial, on the ground of the improper reception of evidence, and also of misdirection.—First, the witness was competent to prove the law of Prussia, for he had studied at the Leipsic University, and thus had the means of obtaining a knowledge of it; and whether that knowledge was acquired by study or practice is only a ground for observation on the value of his evidence. [*Platt*, B.—According to that argument, a Dutchman, who had studied law at an English university, would be competent to give evidence of the law of England. *Alderson*, B.—If a man who has studied law in Saxony, and never practised in Prussia, is a competent witness to prove the law of Prussia, why may not a French-

man, who has read books relating to Chinese law, prove what the law of China is?] In *Baron De Bode's case* (a) the testimony of a French advocate, practising in Strasburg, was admitted to prove the law of Alsace, although he had acquired his knowledge by legal study. [Alderson, B.—Would a person who had never been in England, but had studied the law of England at a foreign university, be competent to prove what the law of England is?] His evidence would be admissible, although it might be of little value. [Pollock, C. B.—In a case depending on medical testimony, would the evidence of a person be admissible who had studied medicine at one of the universities, but had never practised it?] If the science had been the avowed object of his study, his testimony would be admissible, and that is analogous to this case; for here the witness had expressly studied the law of Prussia at the University of Leipsic. [Rolfe, B.—If you are correct, it would be sufficient to call any person as a witness who had studied the law of Prussia at the University of Oxford.] According to the case of *Vanderdonckt v. Thellusson* (b), any person conversant with foreign law, though not a professor of it, or connected with the profession, is a competent witness to prove it.

Secondly, assuming that the foreign law was sufficiently proved, the receipts were not admissible in evidence. By the comity of nations, the Courts of this country notice the revenue laws of foreign states. In *Alves v. Hodgson* (c), it was held, that a promissory note not stamped as required by the law of Jamaica was not receivable in evidence here. Lord *Kenyon* there says, "It is said that we cannot take notice of the revenue laws of a foreign country; but I think we must resort to the laws of the country in which the note was made, and unless it be good

1850.
 Bristow
 v.
 Sequeville.

(a) 8 Q. B. 208.

(b) 19 L. J., C. P., 12.

(c) 7 T. R. 241.

1880.

BRISTOW
v.
SEQUINVILLE.

there, it is not obligatory in a Court of law here." [*Pollock*, C. B.—That decision proceeded on this ground, that, if it be not a contract at the place where it is alleged to be made, it is no contract at all. *Alderson*, B.—It is very different, whether the law makes a stamp necessary to the validity of an instrument, or to its admissibility in evidence. An unstamped deed is a valid contract here, although it cannot be given in evidence. If, by the law of a foreign country, a document is only inadmissible for want of a stamp, it is a valid contract, and receivable in evidence in another country. *Pollock*, C. B.—*James v. Catherwood* (a) is an authority in point; there the defendant's counsel objected, that certain receipts for money lent in France were inadmissible, and offered to shew that, by the law of France, such receipts required a stamp; but *Abbott*, C. J., admitted them; and, on motion for a new trial, said, "This point is too plain for argument. It has been settled, or at least considered as settled, ever since the time of Lord *Hardwicke*, that, in a British Court, we cannot take notice of the revenue laws of a foreign state. It would be productive of prodigious inconvenience, if, in every case in which an instrument was executed in a foreign country, we were to receive in evidence what the law of that country was, in order to ascertain whether the instrument was or was not valid." Also, in *Holman v. Johnson* (b), Lord *Mansfield* says, "No country ever takes notice of the revenue laws of another."]

Thirdly, The onus was on the plaintiff to prove that the Company was not finally constituted; and, upon the evidence, the jury ought to have been directed to find for the defendant. It was a Company to be put in operation abroad, and there was no evidence that nothing had been done towards its final constitution there.

POLLOCK, C. B.—There ought to be no rule. The ques-

(a) 3 D. & R. 190.

(b) Cowp. 343.

tions as to the stamp, and the evidence of the foreign law, have been disposed of during the argument. With respect to the remaining point, I think the learned Judge was quite right in leaving it to the jury, and they were right in deciding the matter in the negative. It is said that there ought to have been some distinct evidence that the Company was not finally constituted abroad; but it appears to me sufficient to give such evidence as raises a reasonable doubt as to the fact of the constitution of the Company; and the plaintiff having given evidence *prima facie* inconsistent with the existence of the Company, and the defendant having given no evidence at all, the jury were well warranted in finding that the Company was not finally constituted.

1860.
BRISTOW
v.
SEQUENVILLE.

ROLFE, B.—The marginal note of *Alves v. Hodgson* is perfectly correct, although I cannot help thinking that there must be some mistake in the report of the case. The marginal note is in these terms: "The plaintiff cannot recover upon a written contract made in Jamaica, which, by the laws of that island, was void for want of a stamp." I agree that if for want of a stamp a contract made in a foreign country is void, it cannot be enforced here. But if that case meant to decide, that where a stamp is required by the revenue laws of a foreign state before a document can be received in evidence there, it is inadmissible in this country, I entirely disagree. If that were so, it would be impossible to get out of this dilemma, that if a document were properly stamped according to the law of this country, it could not be given in evidence here, because it was improperly stamped according to the law of a foreign country where it was given.

ALDERSON, B., and PLATT, B., concurred.

Rule refused.

1850.

May 1.

VERTUE v. THE EAST ANGLIAN RAILWAYS COMPANY.

The transferee of a bond, transferred to him under the provisions of the Companies Clauses Consolidation Act, (8 & 9 Vict. c. 16,) is the party in whose name an action upon the bond must be brought.

DEBT on bond. — The defendant craved oyer of the bond, which was as follows:—"The East Anglian Railways Company. Bond, No. 68. £1000. By virtue of the East Anglian Railways Act, 1847, We, the East Anglian Railways Company, in consideration of the sum of 1000*l*. to us in hand paid by George Vertue, of &c., do bind ourselves and our successors unto the said George Vertue, his executors, administrators, and assigns, in the penal sum of 2000*l*. The condition of the above obligation is such, that, if the said Company shall pay to the said George Vertue, his executors, administrators, or assigns, on the 31st of December, 1850, the principal sum of 1000*l*., together with interest for the same, at the rate of 5*l*. per cent. per annum, payable half-yearly on the 30th of June and 31st of December, then the above-written obligation is to become void, otherwise &c. Given under our common seal &c. Every transfer of this bond must, in order to its validity, be produced to the Secretary of the Company, that it may be registered. Note.—The interest on this bond will be paid half-yearly by Messrs. B. & Co., on production of the interest coupons, and no interest will be paid except upon production of such coupons."

The defendants pleaded, secondly, that, after the passing of the said Act, and after it came into operation, and before the commencement of the suit, to wit, at the time of the making of the said supposed writing obligatory, the defendants, being the East Anglian Railways Company mentioned in and incorporated by the said Act, and by virtue of its powers, borrowed and took up at interest of the plaintiff a certain sum of money, to wit, the sum of 1000*l*., upon security of the said supposed bond, which they then gave to the plaintiff, sealed with their common seal, and subject to the said condition, &c.; and further, that, after the

making of the said supposed writing obligatory, and within fourteen days after the date thereof, and before the making of the transfer hereinafter mentioned, to wit, on &c., an entry and memorial of the said bond, specifying the number of the said bond, to wit &c., also its date, to wit &c., also the sum of money secured thereby, to wit &c., also the names of the parties to the said bond, with their proper additions, to wit &c., were duly and in pursuance of the said Act made in the register of mortgages and bonds then, to wit, on &c., kept by W. W., the then secretary of the defendants; and further, that afterwards, and before the commencement of the suit, to wit, on &c., the plaintiff was the party entitled to the said bond and to the said sum of money, to wit &c., and to the interest so secured thereby; and being the party so entitled, he the plaintiff then by deed sealed with his seal, and which, being in the possession of Sir Charles William Taylor, Bart., hereinafter mentioned, the proper owner thereof, the defendants cannot produce to the Court here, the date whereof is &c.; the said last-mentioned deed then being a deed duly stamped, and wherein the consideration for the transfer thereby made was truly stated, the plaintiff, by virtue and in pursuance of the provisions of the said Act, transferred the said bond, and all his right and interest in and to the said money thereby secured, to the said Sir C. W. Taylor, Bart., of &c.; and further, that, after the making of the said last-mentioned deed and of the said transfer thereby made, and within thirty days thereof, and before the commencement of the suit, to wit, on &c., the said deed and transfer were duly produced to the said W. W., the secretary of the defendants, and who, as such secretary, then, to wit, on &c., acted as and was such secretary, and who, as such secretary, then, to wit, on &c., kept the said register of mortgages and bonds; and the said W. W., so being such secretary as aforesaid, thereupon forthwith, and before the commencement of the suit, to wit, on &c., and according

1850.

VERTUE

v.

EAST ANGLIAN
RAILWAYS CO.

1850.


 VERTUE

 v.
 EAST ANGLIAN
 RAILWAYS CO.

to the provisions of the said Act, caused an entry and memorial of the said last-mentioned deed and transfer to be duly made in the said register of mortgages and bonds, in the same manner in all respects as had been done in the case of the said bond, (specifying the date, amount, &c., as before); and further, that the said transfer, and the said entry and memorial of the said transfer, &c., being so made as aforesaid, and immediately after the making of the said last-mentioned entry and memorial, and before the commencement of the suit, to wit, on &c., the plaintiff ceased to be entitled to any right or interest in respect of the said supposed writing obligatory in the declaration mentioned, or to the money thereby secured; and further, that the said transfer, and that the said entry and memorial thereof, having been so made as aforesaid, thereupon and immediately after the making thereof, to wit, on &c., the said transfer, by virtue of the said Act, entitled the said Sir C. W. Taylor, Bart., to the full benefit of the said bond in all respects; and that he hath been and still is so entitled thereto, &c.—Verification.

Special demurrer, assigning for causes, that the plea was bad, and that action was correctly brought in the name of the plaintiff; that the plea did not state that the plaintiff was suing in his own right, and not as trustee of Sir C. W. Taylor; that it did not shew that the bond was one which could be assigned under the East Anglian Railways Act and the 8 & 9 Vict. c. 16; and that it did not sufficiently allege that the bond was duly registered, or that a proper entry was made, so as to entitle Sir C. W. Taylor to the benefit of it, or that he had ever had notice of the deed of transfer, or that he accepted it.—Joinder in demurrer.

Prentice, in support of the demurrer.—The substantial question for the opinion of the Court is, whether the action is properly brought by the plaintiff, or whether it

ought to have been brought by the alleged assignee of the bond. The Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, is incorporated by the East Anglian Railways Act, 10 & 11 Vict. c. cclxxv, s. 5, and by the 28th section of the latter Act the Company are authorised to borrow money on mortgage or bond. By the 41st section of the 8 & 9 Vict. c. 16, "Every mortgage and bond for securing money borrowed by the Company shall be by deed under the common seal of the Company, duly stamped, and wherein the consideration shall be truly stated; and every such mortgage deed or bond may be according to the form in the schedule (C) or (D) to this Act annexed, or to the like effect." And by the 46th section: "Any party entitled to any such mortgage or bond may from time to time transfer his *right and interest* therein to any other person; and every such transfer shall be by deed, duly stamped, wherein the consideration shall be duly stated; and every such transfer may be according to the form in the schedule (E) to this Act annexed, or to the like effect." By the 47th section it is enacted, that, "Within thirty days after the date of every such transfer, if executed within the United Kingdom, or otherwise within thirty days after the arrival thereof in the United Kingdom, it shall be produced to the secretary, and thereupon the secretary shall cause an entry or memorial thereof to be made in the same manner as in the case of the original mortgage; and, after such entry, every such transfer shall entitle the transferee to the full benefit of the original mortgage or bond in all respects; and no party having made such transfer shall have power to make void, release, or discharge the mortgage or bond so transferred, or any money thereby secured," &c. The defendant will contend that, after the transfer of the bond, not only the transferor's right and interest in the bond is transferred, but also the right of bringing an action upon it. At common law, the right of action is not assignable; and therefore,

1850.
 VERTON
 v.
 EAST ANGLIAN
 RAILWAYS CO.

1850.
 VERTUE
 v.
 EAST ANGLIAN
 RAILWAYS CO.

unless the right of action is expressly transferred by Act of Parliament, the action ought to be brought in the name of the transferor. In *Jeffery v. M^cTaggart*(a), the question turned upon the words of the 29th section of the 54 Geo. 3, c. 137, (Scotch Bankrupt Act,) by which the Court is to ordain the bankrupt to execute and deliver proper deeds of conveyance or assignment of his whole estate and effects; and in all events, whether such deed be executed or not, the whole estate and effects, of whatever kind and wherever situate, (in so far as may be consistent with the laws of other countries, when the effects are out of Scotland,) shall be deemed and held to be vested in the trustees for behoof of the creditors; and the Court shall declare every right, title, and interest which was formerly in the bankrupt to be now in the trustee, for the purposes aforesaid. The words of that section are extremely strong; and yet the Court held, that the trustee under that Act could not sue in his own name for a chose in action. Lord *Ellenborough* there said, "I have looked into the statute with great anxiety, because this is a question of considerable moment, and it came upon me at the time by surprise; but I cannot find any words conveying to the plaintiff a right of suit. The utmost extent to which the language of the Act can be carried, is to a right of property." The authority of that case was recognised in *Sidaway v. Hay*(b). [*Rolfe*, B.—There is this distinction to be observed between this case and the one you rely upon: there the property is only once assigned, but here the bond may be frequently transferred]. The right to sue ought to be expressly given. This is done in several Acts. Thus, the Bankrupt Act, 6 Geo. 4, c. 16, s. 63, enacts, that the "assignees shall have like remedy to recover the same in their own names, as the bankrupt himself might have had if he had not been adjudged bankrupt." And the same is

(a) 6 M. & Sel. 126.

(b) 3 B. & C. 12.

the case in the 4 Anne, c. 16, s. 20, relating to bonds, and the 11 Geo. 2, c. 19, which relates to replevin bonds.—He also relied upon the objections raised by the special grounds of demurrer.

1850.
 VERTON
 v.
 EAST ANGLIAN
 RAILWAYS CO.

Bramwell, contra, was stopped by the Court.

POLLOCK, C. B.—I am of opinion that the defendants are entitled to judgment in this case. Under the terms of the general Act of Parliament, the property in the bond is transferred, with all the transferor's right and interest and benefit therein. These are the three expressions in the 46th and 47th sections of the Act; and as it contains a special power of transfer, and as a mere assignment of a chose in action did not require an Act of Parliament, it must therefore be inferred that it was intended that the statute should give all the legal interest, and that a legal transfer for all intents and purposes should be made. And how can it be said, that a party has the entire legal right, interest, and benefit in the instrument, unless he also has the power of suing upon it in his own name? It therefore becomes unnecessary to distinguish this case from that of *Jeffery v. M'Taggart*, for neither are the words of the statute upon which that decision turned the same as those in the present Act, nor are the objects for which it was passed the same. The object of this Act is clearly to make these bonds in a way negotiable: not generally negotiable, but to the extent that all the transferor's right, interest, and benefit in the instrument should be transferred to his transferee as soon as the required form shall have been gone through. I therefore must say, that I entertain no doubt whatever that the action ought to have been brought in the name of the transferee of the bond, and not in that of the original obligee. With respect to the objections raised by the special demurrer, I do not think that any of

1860.

VENTON

EAST ANGLIAN
RAILWAYS CO.

them are tenable. The defendants, therefore, are entitled to judgment.

ROLFE, B.—I am of the same opinion. The only substantial question is, whether the assignor or the assignee of the bond is the proper party to sue upon it; and I think that it is abundantly clear, from the different sections of the Act, that the assignee is that party. If it were not so, the power given by the Act would become almost nugatory. Where is the use of all the machinery relating to the transfer of these bonds, if the transferees are not to be the legal bondholders for all intents and purposes? By reference to the 45th clause of the Companies Clauses Act, it appears that the book of the transfer of these bonds is to be open to the members and to the creditors. Who are these parties? Clearly not they who, twenty years before, had been bondholders, but those parties whose names would at that time appear upon the books. The parties who are registered are the bond creditors, and are entitled to sue like other creditors.

PLATT, B.—It seems to me that the 46th section gives the power to a bondholder to transfer all his legal title in the bond to the transferee. It was no doubt considered that a very great advantage would be conferred upon both the borrowers and lenders of money in these transactions by giving a quasi negotiability of character to these instruments. Thus, a party who has lent money may dispose of his interest in his bond as he might of any property he possesses in the funds.

Judgment for the defendants

THE EAST LANCASHIRE RAILWAY COMPANY v. CROXTON.

May 1.

DEBT for calls.—The first count of the declaration stated, that the defendant, *at the time of the making of the calls hereinafter mentioned, was and still is* the holder of divers, to wit, thirty-nine shares in the said Company, called by a certain name, to wit, quarter shares; and *before the commencement of this suit, to wit, on &c., was and still is* indebted to the said Company in a large sum, to wit, the sum of 195*l.*, parcel of the sum above demanded, in respect of two calls upon each of the said shares, *theretofore duly made by the said Company*, each of the said calls being of the sum of 2*l.* 10*s.* upon each of the said shares; whereby and by reason of the said sum of 195*l.*, parcel &c., being and remaining wholly unpaid to the said Company, an action hath accrued to the said Company, by virtue of a certain Act of Parliament made and passed in a session of Parliament holden in the 7th & 8th years of the reign of her Majesty Queen Victoria, intituled “An Act for making a Railway from the Manchester and Bolton Railway, in the parish of Eccles, to the parish of Whalley, all in the County Palatine of Lancaster, to be called ‘The Manchester, Bury, and Rossendale Railway;’ and also by virtue of an Act of Parliament made and passed in a session of Parliament holden in the 10th and 11th years of the reign of her Majesty Queen Victoria, intituled “An Act to enable the East Lancashire Railway Company to alter the line and levels of their railway and to make a branch railway therefrom, and for other purposes relating thereto,” to demand from the defendant the said sum of 195*l.*, parcel of the sum above demanded. There was a second count of a similar form, for other calls.

A declaration for calls stated, that the defendant, at the time of the making of the calls thereinafter mentioned, *was and still is* the holder of divers shares, to wit, &c., in the Company called &c., and before the commencement of the suit *was and still is* indebted to the Company in a large sum, to wit, &c., in respect of two calls upon the said shares, *theretofore duly made by the said Company*, each of the said calls being &c.; whereby and by reason of the said sum of &c. being wholly unpaid to the said Company, an action hath accrued to the said Company by virtue of the special Acts of Parliament, viz. the Companies’ Acts, (incorporating the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16): —*Held*, on special demurrer, that the declaration was good, and that it sufficiently complied with the form

given by the 8 & 9 Vict. c. 16, s. 2d.

1860.

EAST LANCASHIRE
RAILWAY COMPANY
v.
CROXTON.

Special demurrer to the first count, alleging for cause, that it did not properly follow the form of declaration given by the statute, or else the count should have set forth the special matter and facts, shewing how the defendant was indebted; and that it improperly introduced other and different matters and words than those prescribed by the statute; and that it improperly alleged that the calls were "heretofore duly made by the Company;" and that, instead of simply alleging that the calls were so duly made, it should have stated facts shewing how they were made, and the days or times when they were made. There was a similar demurrer to the second count.—Joinder in demurrer.

H. Hill, in support of the demurrer.—The declaration is bad. The stat. 8 & 9 Vict. c. 16, s. 26, gives a form of declaration, which the plaintiff has improperly departed from. There are three serious objections to this declaration. In the first place, the allegation that the defendant "was and still is the holder" is incorrect, for, by the 26th section of the 8 & 9 Vict. c. 16, it is enacted, that "it shall be sufficient for the Company to declare that the defendant *is the holder* of one share or more in the Company." In *The Belfast and County Down Railway Company v. Strange* (a), *Parke, B.*, says,—“That section”—speaking of the 27th—“shews what the legislature meant by the word ‘is’ in the 26th section. The declaration ought simply to have stated that the defendant is a shareholder and indebted to the Company for calls; the allegation that he was a shareholder at the time of the commencement of the suit, raises a doubt whether the plea of ‘never indebted’ would answer the whole declaration. The legislature says that, under the allegation that the defendant is the holder of shares, it shall be sufficient to prove him a holder at the

(a) 1 Exch. 739.

time the call was made." That case may be cited to shew that inconvenience may follow by a departure from the ordinary statutory form. The next objection is, that the declaration states that "the calls were heretofore duly made," without stating how and when they were made. The last objection is, that the declaration varies from the statutory form by the insertion of the allegation "by virtue of the general and the special Acts." In *Moore v. The Metropolitan Sewage Manure Company* (a), the declaration omitted the words "whereby an action hath accrued by virtue of this and the special Act;" and *Parke, B.*, said—"Independently of the statute, it would be necessary to state all the facts specially; but the statute having given a general form, the defendants ought to bring themselves within its terms." And in that case an amendment was made by the insertion of the words "whereby an action hath accrued by virtue of this and the special Act." [*Rolfe, B.*—These identical questions, I believe, came before the Court in *The Midland Great Western Railway Company of Ireland v. Evans* (b).] In that case the objections were not, perhaps, specifically raised by the special demurrer.

1850.
EAST LANCASHIRE RAIL-
WAY COMPANY
v.
CROXTON.

Gray, contra.—The declaration is good. The only objection which can be raised to it is on the ground that it contains certain superfluous words, which might be rejected as surplusage. The stat. 8 & 9 Vict. c. 16, does not impose a form of declaration. The 26th section merely states that it shall be *sufficient* so to declare. The present declaration, moreover, is under other Acts of Parliament, and it may be that the general Act has no application to the case. [*Pollock, C. B.*—The difficulty I have is, with regard to the words "was and still is."] The word "still" may be rejected as surplusage. The rules with respect to the surplusage may be found in *Bristow v. Wright* (c), Co.

(a) 3 Exch. 333.

(b) 4 Exch. 649.

(c) Dougl. 665.

1850.

EAST LANCASHIRE RAILWAY COMPANY
v.
GROXTON.

Litt. 303. b., and 1 Chitty on Pleading, 252, 7th edit. [Rolfé, B.—The sentence might bear a different meaning if that word were rejected; for, in that case, the verb “is” might have the statutory meaning, whereas it would otherwise have its natural meaning. Pollock, C. B.—In the case of *The Midland Great Western Railway Company of Ireland v. Evans*, the declaration contained a statement, that, “before the commencement of the suit, and from hence hitherto, the defendant hath been and still is the holder of divers, to wit, forty shares,” and my Brother Alderson, in delivering the judgment of the Court, says, “It would have been sufficient to have stated only that the defendant is the holder of forty shares. The declaration states something besides, the utmost effect of which is, that the declaration is open to the objection of surplusage; and that cannot be taken advantage of, even on special demurrer.” It also appears that another of the objections here raised was taken and overruled in that case, namely, that the declaration was correct in form, by referring to the special Acts of Parliament under which the calls were made.]

Hugh Hill was heard in reply.

POLLOCK, C. B.—I am of opinion that the present case is not distinguishable from that of *The Midland Great Western Railway Company of Ireland v. Evans*, upon reference to which it appears that the same objection was taken as the defendant has here raised, namely, that the form given by the Act of Parliament had not been followed. I was no party to the judgment in that case, but it appears to have been decided after time taken for consideration. The ground of that decision is, that the requirements of the Act may be complied with, although the declaration does not strictly adhere to the form suggested. In that case, as in the present, the declaration contained certain other matters in addition to those given by the statute; and the

Court held, that the utmost effect that could be given to the objection raised to such matters was, that they amounted to surplusage, and could not be taken advantage of by special demurrer. It appears to me, that if the declaration contains all that the statute requires, and in addition to that, some other matters which may be struck out without affecting the sense of the pleading, the declaration is not open to special demurrer. The present case falls within the spirit of the decision referred to, and is governed by it. I therefore am of opinion that the plaintiffs are entitled to judgment.

1850.
EAST LANCA-
SHIRE RAIL-
WAY COMPANY
v.
CRONSTON.

ROLFE, B.—I am of the same opinion,—that our judgment ought to be in favour of the plaintiffs, on the ground that the present case is governed by that referred to by my Lord, and which has been so recently decided. I was at first inclined to think that there was a distinction between them. In substance, however, the objection is the same in both,—that the statutory form has not been followed. Now it appeared to me at first, that Mr. *Hill's* argument had some plausibility,—that the averment “was and still is” must be taken as requiring a different meaning to be attached to the word “is,” than that which has been given to it by the statute. But, in the preceding case, the allegation was, that “before the commencement of the action, and from thence hitherto, the defendant hath been and still is,” which was open to the same objection, and the same argument would apply. But the Court there held, that the additional words were merely surplusage; and then the allegation meant that the defendant was the holder at the time the calls were made. Applying the principle of that case to the present, the plaintiffs are entitled to judgment.

PLATT, B.—It appears to me that this case in principle

1850.

EAST LANCA-
SHIRE RAIL-
WAY COMPANY
v.
CROXTON.

is not in the least degree distinguishable from that upon which my learned Brothers have founded their judgment, and I feel much satisfaction in relying upon that decision.

Judgment for the plaintiffs.

May 8.

RENNIE and Another v. CLARKE.

In an action by the plaintiffs for work done as engineers for a Railway Company, of which the defendant was a member of the provisional committee, the plaintiffs gave in evidence certain resolutions of the committee, made at meetings, at which the defendant was present. The defendant offered in evidence a resolution to the effect that engineers should be employed, but that the members of the provisional committee were not to incur any personal responsibility; but at that meeting the plaintiffs were not present:—*Held*, that the resolution was receivable in evidence.

ASSUMPSIT for work and labour.—Plea (inter alia), non assumpsit; upon which issue was joined.

At the trial of the cause, before *Pollock*, C. B., at the London Sittings after last term, it appeared that the action was brought by the plaintiffs, as joint engineers, for work done by them, against the defendant, a member of the provisional committee of the Direct East and West Junction Railway Company. In order to prove the joint employment of the plaintiffs by the defendant, the plaintiffs put in evidence all the resolutions of the provisional committee at meetings when the defendant was present, and in which he took part. The case set up by the defendant was, that the plaintiffs, or one of them, were to hold him harmless, and that he was to be free from all personal liability. In order to establish this defence, the defendant offered in evidence a resolution to the effect that the engineers were to be employed, and that they were to give the usual bond of indemnity to the members of the provisional committee, and that such bond should be immediately ready for execution, so as to free them from all responsibility. Neither the plaintiffs nor the defendant were present at the meeting at which this resolution was passed, nor had the plaintiffs notice of it. The plaintiffs thereupon objected to the admission of this evidence, but the Lord Chief Baron overruled the objection, and admitted it. The defendant obtained a verdict.

In the present term (April 22),

1850.

RENNIE
v.
CLARKE.

Bovill moved for a new trial, on the ground (inter alia) that this evidence was improperly admitted, and contended that, as the acts of the members of a provisional committee are not binding upon other members, unless it be shewn that they have assented to them, the evidence ought not to have been received. The Court intimated that they were of opinion that the evidence was admissible, but took time to consider whether, upon the whole case, the plaintiffs were entitled to a rule.

Cur. adv. vult.

PARKE, B. now said:—There is no doubt that the Lord Chief Baron was perfectly right in receiving in evidence the resolution, to the admissibility of which the plaintiffs objected. It would not appear until the conclusion of the cause, whether the case was to rest upon the actual authority given by the defendant to the other members of the provisional committee, or to persons acting by their authority, or whether the defendant himself had personally employed the plaintiffs. That being so, the defendant had a perfect right to shew, that by the terms under which he and the other members of the provisional committee had entered into the undertaking, they were not to incur any personal responsibility, and that each member was not to have the power of binding the rest. There can be no question, therefore, that this evidence was receivable. His Lordship, after proceeding to dispose of the other objections, said,—We all agree that there ought to be no rule.

Rule refused.

1850.

April 15.

HARDY, Assignee of ANTHONY BACON, an Insolvent,
v. TINGEY.

The 61st section of the 1 & 2 Vict. c. 110, does not apply to bills of sale which convey the property absolutely, but only to an executory bill of sale.

In an action of trover for goods by the assignee of an insolvent, the plaintiff, in order to establish the insolvent's title to the goods in question at a certain time, gave in evidence a bill of sale, by which the insolvent, in consideration of the sum of 499*l.*, sold absolutely the goods to the defendant and other persons, and the plaintiff then produced evidence to impeach the validity of the bill of sale, by shewing that it was wholly void on the ground of fraud. The plaintiff having obtained a verdict,—*Held*, that he was entitled to the costs incurred in the production of that evidence.

THIS was a rule calling on the plaintiff to shew cause why the taxation of costs in this case should not be reviewed. An action of trover for the conversion of certain furniture and other goods had been brought by the plaintiff, as assignee of the estate, &c. of A. Bacon, an insolvent; the first count of the declaration being founded on the possession of the insolvent, and the second on that of his assignee. The defendant pleaded, first, not guilty; and secondly, not possessed; upon which pleas issues were joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after Trinity Term last, in order to shew that at a certain time the insolvent was possessed of the goods in question, the plaintiff gave in evidence a bill of sale of the furniture and goods, dated the 24th of July, 1847, and made between the insolvent of the one part, and the defendants, J. Smith, and H. Hough, of the other part. This bill of sale, after reciting a contract by the insolvent with the defendant and the other parties, for the absolute sale to them of the furniture in question, witnessed that, in consideration of 499*l.*, the insolvent bargained and sold the furniture to the defendant and the others, to have, hold, and take the furniture to them for their absolute use and benefit. The defendant had disposed of the goods by sale to third parties subsequently to the insolvent's imprisonment. The plaintiff then adduced evidence to shew that the bill of sale was a merely fraudulent and colourable transaction, made without any intention of passing the property to the defendant. It was admitted, on the part of the defendant, that he could not rely upon the bill of sale, and the defendant's title was rested upon the fact of his having pur-

chased the goods after they had been seized for rent due from the insolvent and condemned. The plaintiff then proved that a portion of the goods which had been converted had not been seized for rent, and the jury found a verdict for the plaintiff, with 175*l.* damages, but which were afterwards by consent reduced to 20*l.* The Master having allowed to the plaintiff the costs of procuring the production of the bill of sale, and of impeaching its validity, the above rule was obtained for reviewing the taxation.

1850.
HARDY
v.
TINGHY.

Martin shewed cause.—The question as to the propriety of the Master's taxation arises upon the second count of the declaration. If the bill of sale had been valid, it would have afforded a good defence to that count, and the plaintiff, therefore, was justified in the production of evidence for the purpose of defeating that instrument. No statute can be cited by which that instrument is rendered unavailable under the circumstances of the present case. [Sir *F. Thesiger*, who appeared in support of the rule, stated that he relied upon the 61st section of the 1 & 2 Vict. c. 110(a). *Parks, B.*—The question here is, whether this

(a) That section enacts, "That in all cases where any prisoner, whose estate shall have been vested in the said provisional assignee under this Act, shall have executed any warrant of attorney to confess judgment, or shall have given any cognovit actionem, or bill of sale, whether for a valuable consideration or otherwise, no person shall, after the commencement of the imprisonment of such prisoner, avail himself or herself of any execution issued or to be issued upon any judgment obtained or to be

obtained upon such warrant of attorney, or cognovit actionem, or of such bill of sale, either by seizure and sale of the property of such prisoner, or any part thereof, or by sale of such property theretofore seized or any part thereof, but that any person or persons to whom any sum or sums of money shall be due in respect of any such warrant of attorney, or cognovit actionem, or of such bill of sale, shall and may be a creditor or creditors for the same under this Act."

1850.

HARDY
v.
TINGHY.

instrument is an absolute bill of sale, or merely a power to sell. In *Hunt v. Robins* (a), to a declaration in trover by the assignees of an insolvent, the defendant pleaded, that before the insolvent's imprisonment he discounted for the insolvent a bill of exchange payable one month after date, and that, to secure payment of the bill, the insolvent executed a bill of sale of the goods in question to the defendant, by which the insolvent covenanted, that, in case of his default in paying the bill of exchange, the defendant should have the goods as his absolute property. The plea then stated that the bill of exchange was not paid when it became due, and that thereupon, and before the insolvent's imprisonment, the defendant took possession of the goods and converted them; and it was held, that the plea was good, and that the 61st section had no application to the case. Lord *Denman*, C. J., there says, "The object of the section was to prevent a person, to whom a warrant of attorney, or cognovit, or bill of sale had been given, from availing himself of it after the commencement of the insolvent's imprisonment; but the provision that no person shall, after the commencement of the insolvent's imprisonment, avail himself of a bill of sale 'by sale of such property theretofore seized,' cannot apply to a person who has become absolute owner of the property before the imprisonment." If there be a doubt whether the instrument falls within the 61st section, the plaintiff was fully justified in going to the expense of procuring evidence for the purpose of defeating the bill of sale.—He was then stopped by the Court.

Sir *F. Thesiger*, in support of the rule.—It is urged, that the term "bill of sale," mentioned in the 61st section, means a power of sale, and is not to be understood in its ordinary acceptance. But it is submitted, that the section

(a) 2 G. & D. 646.

1850.
 {
 HARDY
 v.
 TINGBY.

in question does apply to the present bill of sale, and consequently that the plaintiff, although fortified by a counsel's opinion as to the necessity of the evidence, is not entitled to these costs from the defendant. [*Parke*, B.—According to the case in the Queen's Bench, the 61st section does not apply to an instrument which conveys the property absolutely.] The question is not whether the plaintiff acted *prudently*, but whether he acted *properly* in obtaining this evidence. [*Parke*, B.—The decision in the Queen's Bench appears to me to be perfectly correct. There, as in the present case, the instrument was an absolute bill of sale, and not a mere executory instrument.] It was clearly the intention of the legislature that the section should apply to a case like the present, its object being to prevent a party from fraudulently obtaining credit by remaining in possession of the goods which do not belong to him. [*Pollock*, C. B.—The bill of sale mentioned in the 61st section means such a bill as requires something to be done in order to the due completion of the title. *Rolfe*, B.—No part of that section prevents a party to whom goods are absolutely transferred, from keeping instead of selling them. Here nothing is due; and the section only applies to cases where something is due.]

POLLOCK, C. B.—I think that this rule ought to be discharged with costs. It is not necessary to give any opinion upon the construction of this particular Act of Parliament, as it is quite sufficient to say that there is a case which the Court of Queen's Bench have decided upon demurrer, and that their decision is quite sufficient to preclude us from arriving at an opposite conclusion. As the question here arises upon motion, no opportunity is afforded to the parties of disputing our decision. But at all events we should feel ourselves bound by the decision of a Court of co-ordinate jurisdiction, until such decision be corrected by

1850.

HARDY
&
TINNEY.

a Court of error. I may add, that I do not wish or intend to throw any doubt whatever upon that decision of the Court of Queen's Bench.

PARKE, B.—I am of the same opinion. It was reasonable and right for the plaintiff to be prepared with evidence to shew that the bill of sale was fraudulent and void as against himself as assignee. The Court of Queen's Bench in fact have decided this question, and I do not entertain any doubt as to the propriety of that decision. They were clearly correct in saying that the 61st section applies to such bills of sale only as are given by way of security.

ROLFE, B.—I am of the same opinion. I agree in thinking that the decision of the Court of Queen's Bench was clearly right in that case. The maxim of *nescitur a sociis* applies to the language of the 61st section, which speaks of any warrant of attorney, *cognovit actionem*, and bill of sale: and enacts, that a party is not to avail himself of this instrument in the character of a creditor.

Rule discharged, with costs.

1850.

DOE *d.* ELIZABETH WILLIAMS *v.* HOWELL

April 15.

SIR F. Thesiger had obtained a rule calling upon the lessor of the plaintiff, Elizabeth Williams, to shew cause why an attachment should not issue against her for contempt in not executing a certain indenture, pursuant to the directions contained in an award. It appeared by the affidavits, that an action of ejectment had by an order of *Nisi Prius* been referred to an arbitrator, who was thereby empowered to settle all matters in difference between the parties; and to make what should be a proper distribution of certain property, in accordance with the statement made by the lessor of the plaintiff, immediately after the funeral of the testator John Howell, deceased; and how such distribution should be enforced; and to order and determine what he should think fit to be done by the parties respecting the matter in dispute. The arbitrator by his award, dated the 23rd of February, 1848, awarded, "that the said E. Williams do, on or before the 23rd day of March next, duly execute an indenture, to be prepared by and at the expense of the said Howell Howell, and to be in the words or to the tenor and effect following." The indenture was then set out in the award. No demand of the execution of the indenture was made on or before the 23rd of March; but upon three subsequent occasions an engrossment of the above-mentioned indenture was tendered to the lessor of the plaintiff for execution, which she refused to execute.

An action having, by an order of *Nisi Prius*, been referred to an arbitrator who was to settle all matters in difference between the parties, and to order and direct as to the proper distribution of certain property, as to him should seem fit, he accordingly made his award, and awarded (*inter alia*) that the plaintiff "do, on or before the 23rd of March next, duly execute an indenture to be prepared by H. H. (the defendant), in words and figures following," (setting it out). No demand of the execution of the instrument was made upon the plaintiff before or on the day mentioned in the award:—*Held*, that the plaintiff was not liable to an attachment for refusing to execute the deed on demand made after the 23rd of March.

Martin and Hancoe shewed cause.—The lessor of the plaintiff has not rendered herself liable to an attachment by her refusal to execute the deed, as it appears that a condition precedent to such obligation has not been observed by the party who seeks this form of remedy against her. There was not any execution by Howell Howell of the

1850.
 Do
 d
 WILLIAMS
 v.
 HOWELL.

deed, nor any tender of it to her for her execution before the day specified in the award. If an action had been brought for the non-performance by her of this award, the declaration would have been bad in arrest of judgment, if the allegation of the performance of this condition precedent had been omitted in it. And it is perfectly clear that an attachment will not be granted where an action could not be maintained for the same matter.

Watson and Lydekker, in support of the rule.—Time is not of the essence of this contract. The party would be bound to execute the deed at any time. The substance of the contract is, that she is to execute the deed. This is analogous to the ordinary case where it is the duty of the arbitrator to find whether a sum of money is due, and by whom it is to be paid; and in such case, if he directs the money to be paid on a particular day, and it is not paid on or before the time, an attachment will be granted, although a previous demand had not been made: *In re Craike* (a). [*Parke*, B.—In such case a demand is not necessary; but here there has been no disobedience of the rule of Court, unless she was bound to execute the deed at any time.] The duty imposed is of a continuing character. [*Parke*, B.—There is good reason why a particular time should be fixed for the execution of the instrument, for that act might be of much importance to her with reference to subsequent arrangements. *Rolfe*, B.—It does not appear from the affidavits that the deed was ready at the time mentioned in the award.]

POLLOCK, C. B.—This rule must be discharged. Whether the defendant has any remedy or not against the lessor of the plaintiff, is a matter which it is not necessary now to consider. I am inclined to think that he has not; but it

(a) 7 Dowl. P. C. 603.

is clear that the refusal to execute the deed after the day mentioned in the award has not rendered this party liable to an attachment for disobedience to the order. The view I take of an attachment is even stronger than that in which it was placed by Mr. *Martin* in his argument; for I consider that it by no means follows that, where the non-performance of an award would support an action, in every such case an attachment would be granted. By the terms of this award, the deed was to be executed before or upon a certain day therein specified. That day has elapsed without any previous application having been made to the party for the due execution of it. There is therefore no sufficient ground for an attachment.

1850.
 Don
d.
 WILLIAMS
v.
 HOWELL.

PARKE, B.—I am of the same opinion. I very much doubt whether the defendant has any remedy in any shape in this case; for I cannot say that time is clearly not of the essence of this contract. But the matter ought to be free from doubt, to induce us to grant an attachment. I am inclined to be of opinion that the party, having let slip the day for the execution of the deed, has lost all remedy; but it is not necessary to decide that matter now. The propriety of our decision cannot be questioned on a motion for an attachment, as it might be in an action.

ROLFE, B.—I am of the same opinion. The case suggested by Mr. *Watson*, of the payment of money under an award, fails altogether of having any application to the present case; for there nothing is to be done besides the mere payment of the money. But here the party, in order to obtain an attachment, ought to shew that a condition precedent has been performed. That has not been done here, and therefore this application must fail.

Rule discharged.

1860.

May 8.

WILLS v. ROBINSON.

To an action for calls, in which the declaration contained allegations that a board of directors met to make a call, that another board met to determine how notice of a call should be given, and a third meeting met to determine when the call should be paid, the defendant having obtained leave to plead (inter alia) "that the persons alleged as having made the call did not constitute a board of directors," pleaded, "that the said persons in the said declaration mentioned as constituting a board of directors of the said Company did not constitute such board, modo et formâ;" the plaintiff signed judgment thereon, which judgment was set aside by a Judge's order:—*Held*, that judgment was rightly signed, and the Court set the order aside, but without the costs of such application, allowing the defendant to plead de novo on terms.

ROCHFORD CLARKE had in this case obtained a rule calling upon the defendant to show cause why an order of *Alderson*, B., should not be rescinded.

The action was brought by the plaintiff, as secretary of the Neptune Marine Insurance Company, against the defendant for calls; and the declaration, which stated matters necessary to support the due making of a call, alleged that a board of directors met to make a call; that another board of directors met to determine how notice of a call should be given; and that another board met to determine when the call should be paid. The defendant had obtained leave to plead several pleas, and the following is the abstract of the fifth plea:—"That the persons alleged as having made the call did not constitute a board of directors." The defendant pleaded, fifthly, "that the said persons in the said declaration mentioned as constituting a board of directors of the said Company did not constitute such board, modo et formâ; concluding to the country. The plaintiff thereupon signed judgment, on the ground that the plea varied from the abstract. This judgment was afterwards set aside by the above order of *Alderson*, B., with costs to be paid by the plaintiff.

T. Jones shewed cause.—The plaintiff was not entitled to sign judgment. The plea does substantially agree with the abstract. The proper course would have been to have taken out a summons, calling on the defendant to shew cause why the plea should not be amended in accordance with the abstract. There is a material distinction between the case where the plea is pleaded without leave and the present. *Holliday v. Bohn* (a) is an authority

(a) 3 M. & Gr. 115.

that the plaintiff had no right to sign judgment. Here the mistake, if any, cannot be attributed to any mala fides on the part of the defendant. If the plea had been so drawn for the purpose of delay, it might be a different matter: *Hills v. Haymen* (a). [Parke, B.—The defendant has in fact pleaded this traverse without leave, for he had permission to deny the existence of one board only; but the plea puts in issue the existence of three boards.—*Martin*, who appeared to support the rule, cited *Gabardi v. Harmer* (b).] The defendant ought not to be put to the costs of supporting the order of the learned Judge: *Baily v. Baker* (c).

1860.
WILLS
v.
ROBINSON.

Martin and *Rockfort Clarke*, who appeared to support the rule, were not called upon.

PER CURIAM (d).—The rule will be absolute to set the judgment aside upon payment of costs, not including the costs of this motion, the defendant being at liberty to plead issuably within a week.

Rule accordingly.

(a) 2 Exch. 323.

(b) 3 Exch. 239.

(c) 9 M. & W. 769.

(d) *Pollock*, C. B., *Parke*, B.,
and *Platt*, B.

1850.

April 29.

SHIELD v. WILKINS.

Under the terms of a charter-party, the plaintiff's ship was to proceed to B., or as near thereto as she could safely get, and to load from the defendant's agent a full cargo of timber. The vessel proceeded within the harbour at B., and there received a portion of the cargo, but owing to want of water she was then taken without the bar, but as near as she could safely get, where it was requested that the rest of the cargo should be delivered, which was refused:—*Held*, that the plaintiff had complied with the charter-party, and that the defendant was liable for such refusal.

ASSUMPSIT on a charter-party, to recover 652*l.* 17*s.* 6*d.* for dead freight, in respect of the defendant's not having loaded a full cargo, according to the charter-party. The defendant pleaded several pleas, and, after issue joined, by an order of *Alderson*, B., the following case was stated for the opinion of this Court:—

The charter-party provided that the plaintiff's ship should proceed to Riga viâ Bolderaa, or as near thereto as she could safely get, and there load from the agents of the affreighter a full cargo of fir timber. At the time of signing the charter, both parties knew that a full cargo could not be loaded inside the bar at Bolderaa, and the vessel proceed therewith to sea. The vessel arrived at Bolderaa, which is inside a bar, it being a bar harbour. The defendant's agents having loaded the ship inside the bar to the full extent to which she was capable of being loaded consistently with her being able to get out of the harbour over the bar, the vessel left the harbour, and came to anchor as near to Bolderaa as she could safely get outside the bar, for the purpose of taking in the remainder of a full cargo. The defendant's agents refused to give cargo outside the bar at the charterer's expense, contending that the charterer was not liable under the charter-party to give cargo outside the bar. The ship thereupon sailed and returned to Liverpool.

The question for the opinion of the Court was, whether, under the above circumstances, the plaintiff was entitled to recover for dead freight in respect of the defendant's not having loaded a full cargo, according to the terms of the charter-party.

The *Attorney-General*, for the plaintiff.—It is difficult to conceive any sound argument that can be advanced in

favour of the defendant's case. The parties knew the draught of the vessel, and the depth of water within the bar, and that the vessel could not load a full cargo within the bar; and for that reason, no doubt, the term was inserted, that the vessel should be taken as near thereto as she could safely get, so as to enable her to get away in safety with a full cargo.

1850.
 {
 SHIELD
 *
 WILKINS.

Martin, contra.—The defendant contends that he has complied with the charter-party by offering to deliver a full and complete cargo at the place where the vessel had elected to go. It was not in the contemplation of the parties that the vessel was to be loaded at two different places.

POLLOCK, C. B.—Upon the facts of the present case, I am clearly of opinion that the plaintiff is entitled to our judgment; for, according to the terms of the charter-party, the vessel need not have crossed the bar at all, as she was only called upon to go as near to Bolderaa as she could safely go, and she went inside solely for the defendant's accommodation and to save him expense.

ROLFE, B.—It is perfectly clear what the meaning of this contract is,—that the vessel cannot be said to get safely to that place from which she cannot safely get away with a full cargo. The word “safely” means safely as a loaded vessel. Suppose the place to have been such that she could not have taken in with safety to herself a single deal, that would not have been a place whereto she could safely get; and, consequently, as she could not safely get away from within the bar with a full cargo, that was not such a place within the terms of this charter-party.

PLATT, B., concurred.

Judgment for the plaintiff.

1850.

April 25.

STEVENS v. JANE STEVENS, Executrix of ROBERT STEVENS, deceased.

DEBT on a bond for 1990*l.*, against the defendant, executrix of Robert Stevens the obligor. Plea (*inter alia*), that one J. Farquharson did, on the day and year in the said writing obligatory mentioned, to wit, on &c., make the said writing obligatory, and seal the same with his seal; and that the said R. Stevens made the said writing obligatory as such surety for the said J. Farquharson as in the condition thereof is mentioned, and for no other consideration; and that, after the making of the said writing obligatory, and after the death of the said R. Stevens, and before the commencement of the suit, to wit, on &c., the said writing obligatory then being in full force, and after the debt in respect thereof being due and owing by the said J. Farquharson to the plaintiff, and the said J. Farquharson being largely indebted and being unable to pay his said debts, by a certain deed entered into by the said J. Farquharson of the first part, and certain other persons (giving their names) of the second and third parts, the plaintiff being one of the latter, the said J. Farquharson did assign and convey all his personal estate, property, and effects to the said H. M. and J. T. of the second part, upon certain trusts in the said indenture expressed, for the benefit of the plaintiff and J. F., for or by reason of any debt then due and owing by him to the plaintiff; and thereby the plaintiff gave time to the said J. F. in respect of the said debt and writing obligatory, in respect whereof the defendant was such surety. The plaintiff replied by setting out the deed in *hæc verba*. The deed contained (*inter alia*) a proviso that nothing therein contained should prejudice or affect any claim, demand, or remedy which the several parties thereto, and creditors of the said J. F., then had or should have by virtue of any mortgage, lien, charge, or other incumbrance against any person who might be liable for the payment of any of the debts of the said J. F., in the character of a surety or otherwise; and it witnessed, that, in consideration of the assignment thereinbefore made, the several parties thereto, and creditors of the said J. F., covenanted with the said J. F., that they would not at any time commence or prosecute any action, suit, or other proceeding against the said J. F., for any debt then due from him to them; and that, in case of any such action or suit being commenced or prosecuted by them, contrary to the terms of the deed, the deed might be pleaded as a general release in bar of any such action or suit.—*Verification*:—*Held*, on special demurrer to the replication, that it was good, inasmuch as it admitted the effect of the deed as alleged in the plea, but avoided it by the terms of the proviso.

the said other creditors of the said J. Farquharson as aforesaid; and the plaintiff then, to wit, on &c., made, subscribed, and executed the said last-mentioned indenture, and sealed the same with his seal; and did in and by the same indenture covenant with the said J. Farquharson that the plaintiff would not at any time thereafter commence or prosecute any action or other proceeding against the said J. Farquharson for or by reason of any debt then due and owing by the said J. Farquharson to the plaintiff; and thereby the plaintiff gave time to the said J. Farquharson in respect of the said debt and writing obligatory, for and in respect whereof the said R. Stevens during his lifetime, and the defendant as his executrix as aforesaid after his death, was such security as aforesaid.—Verification.

The plaintiff replied to this plea, setting out the deed in hæc verba. The deed, after reciting that J. Farquharson was unable to meet his debts, witnessed, that he did thereby assign all his property to the parties of the second part, upon trust to sell and dispose of the property for the benefit of his creditors and upon certain terms specified in the deed, with a *proviso*, "that nothing herein contained shall prejudice or affect any claim, demand, or remedy which the said several parties hereto or any of them or any other of the creditors of the said J. Farquharson now have, or which they or any of them shall at any time hereafter have by virtue of any mortgage, lien, charge, or other incumbrance, or upon or against any person or persons who may happen to be liable for the payment of any of the said debts of the said J. Farquharson in the character of a surety or sureties or otherwise, anything hereinbefore contained or any rule of law or in equity to the contrary notwithstanding." The deed, after other matters which are immaterial to the present question, witnessed, "that in consideration of the assignment hereinbefore made, the said several parties hereto, creditors of the said J. Farquharson,

1850.
STEVENS
v.
STEVENS.

1850.
 SCHEFFERS
 v.
 SCHEFFERS.

for themselves severally and respectively, and for their several and respective heirs, executors, and administrators, hereby covenant with the said J. Farquharson, his heirs, executors, and administrators, that they the said covenanting parties respectively, their respective executors, administrators, or assigns, will not at any time hereafter commence or prosecute any action, suit, or other proceeding against the said J. Farquharson, his heirs, executors, or administrators, for or by reason of any debt now due and owing by the said J. Farquharson to them or any or either of them; and that, in case any such action or suit being commenced or prosecuted by them or any of them, contrary to the covenant hereinbefore contained, these presents shall and may be pleaded as a general release in bar of any and every such action or suit; and it is hereby lastly agreed, that, in case all the creditors of the said J. Farquharson, whose respective debts shall amount to the sum of 20*l.*, shall not execute these presents, or otherwise accede to the arrangement herein made, within three calendar months from the date hereof, then these presents, and every clause, matter, and thing herein contained, shall cease and be void, but subject, nevertheless, and without prejudice to all and every the acts, receipts, dealings, and transactions of the said parties hereto of the second part, in the meantime; and these presents shall be, in respect of all such acts, receipts, &c., good and valid to all intents &c., notwithstanding any such creditors may not assent thereto, or execute these presents in manner aforesaid."—Verification.

Special demurrer, assigning for causes, that the replication is uncertain and ambiguous in this, namely, whether it is intended thereby to deny the averments contained in the plea or to confess and avoid them; that if it is intended to contend that the deed has not the operation and effect alleged in the plea, the replication should have traversed it, and have concluded to the country; and that

it should have set out the proviso for reserve of remedies only, if the plaintiff intended to rely upon that.—Joinder in demurrer.

1850.
STEVENS
v.
STEVENS.

Butt, in support of the demurrer.—The replication is bad for the reasons assigned. The plaintiff ought to have replied non est factum to the plea: that form of replication would have properly raised the question, and the plaintiff might have objected that the deed offered in evidence by the defendant did not support the plea. The case of *North v. Wakefield* (a) is directly in the defendant's favour upon this point. That was an action upon a promissory note, to which the defendant pleaded that the note was a joint and several note of the defendant and one C., and that the plaintiff released C., and thereby also released the defendant; and to that plea the plaintiff replied non est factum. It appeared that the deed of release contained a proviso that the deed should not operate to discharge any one jointly liable with C. to the debt; and it was there held, that the question as to the legal operation of the deed was raised by the replication; and also that the proviso qualified the release, and that therefore it did not operate to discharge the defendant.

Montague Smith, contra.—The case cited is distinguishable from the present. There the deed was pleaded as an absolute release, the words of the plea being "whereby the defendant was released;" and the replication was proper, for the defendant was unable to support his plea; but here, if the plaintiff had replied non est factum, no variance appearing, he would have failed on that issue. This is merely pleaded as a covenant not to sue, and the plaintiff adopted the true course of pleading by setting out the deed.

PER CURIAM (b).—The replication is good; it admits the

(a) 18 L. J., Q. B., 214.

(b) *Pollock*, C. B., *Parke*, B., *Rolfe*, B., and *Platt*, B.

1850.
 STEVENS
 v.
 STEVENS.

effect of the deed as alleged in the plea, namely, that the covenantee binds himself not to sue, but avoids such covenant by the terms of the proviso. The plaintiff, therefore, is entitled to judgment.

Judgment for the plaintiff.

April 23.

In re THOMAS JAMES.

The Court allowed an attorney, named "Thomas James Moses," to be admitted on the rolls of this Court as "Thomas James," although he had no royal licence to change his name, it being sworn that he was not apprehensive of any proceedings being taken against him by his former name.

SIMON moved for a rule absolute to admit Thomas James Moses as an attorney on the rolls of this Court, by the name of "Thomas James" only. The applicant had not been previously admitted an attorney of this Court; but in the present term, an application had been made to *Coleridge*, J., in the Bail Court, to allow the applicant's name, which stood on the rolls of the Court of Queen's Bench as "Thomas James Moses," to be inrolled for the future as "Thomas James;" and that learned Judge, after consulting the other Judges, allowed the alteration to be made (a). In like manner, *Erle*, J., allowed the name of William Daggett to be substituted on the roll of attorneys, in the place of William Daggett Ingledew: *Ex parte Daggett* (b). The affidavit stated, that the applicant was not desirous of sinking the name of Moses from any apprehension of proceedings being taken against him under that name. It did not appear that he had obtained any royal licence to change his name.

PER CURIAM (c).—Take a rule.

Rule absolute.

(a) 1 L. M. & P. 4.
 (b) Id. 1.

(c) *Pollock*, C. B., *Parks*, B., *Rolfe*, B., and *Platt*, B.

1850.

May 2.

DIMES v. LORD COTTENHAM.

SMYTHIES moved on behalf of the plaintiff for a trial at bar.—The defendant is the Lord Chancellor; and in Archbold's Practice (a) it is stated, on the authority of *Morton v. Hopkins* (b), that if a Judge of either bench, or a Master in Chancery, be a party, the Court will grant a trial at bar as of course, without affidavit. There indeed the plaintiff was a Judge of the Court in which the action was brought; but the case did not proceed on that ground. Besides, the plaintiff is an attorney of this Court; and in *Astrey's case* (c), the Court said, a trial at bar was never denied to any officer of the Court, nor hardly to any gentleman of the Bar. [*Pollock*, C. B.—The state of the administration of the law is very different at the present day to what it was at the period of those Reports, and there is now no time at which a trial at bar is not productive of some inconvenience. The practice of the Court is, to refuse a trial at bar in an issuable term, even on the application of the Crown. There must be some weightier consideration to induce us to grant it, than the fact of the defendant being Lord Chancellor.] The question about to be raised is one of considerable importance, namely, whether it is competent for the Lord Chancellor to decide a case in which he himself has a pecuniary interest. [*Pollock*, C. B.—There is no difficulty in reserving the point for the opinion of the Court, or raising it by a bill of exceptions. We are bound to take care that the general course of administration of justice is not interrupted.]

The Court will not, on the application of the plaintiff, grant a trial at bar merely because the defendant is Lord Chancellor and the plaintiff an attorney of the Court.

ROLFE, B., and PLATT, B., concurred.

Rule refused.

(a) Page 357. (b) 1 Sid. 407. (c) 2 Salk. 651; 6 Mod. 123.

1850.

May 4.

SELLERS v. DICKINSON.

In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power-loom, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then described the manner in

CASE for the infringement of a patent for "an invention of certain improvements in looms for weaving."—The declaration, which was in the usual form, assigned the following breaches:—That the defendant put in practice a part of the invention, and also did counterfeit, imitate, and resemble the invention; and also did make and cause to be made divers additions to the invention and subtractions from the same, whereby to pretend himself the inventor or deviser of such invention.

Pleas—First, not guilty; secondly, that the plaintiff was not the true and first inventor; thirdly, that the invention was not new as to the public knowledge, use, and exercise thereof; fourthly, that the plaintiff did not by the specification particularly describe and ascertain the nature of the invention; fifthly, that the plaintiff did not, within six calendar months next after the date of the let-

which that was done in ordinary looms, and proceeded thus:—"The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the 'frog,' (which is fixed to the framing). In my improved arrangement the loom is stopped in the following manner:—I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the swell; but instead of its striking against a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft at the same time that a projection on the lever strikes against the 'spring handle,' and shifts the strap; simultaneously with these two movements the lower end of the vertical beam causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving;" and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus, the clutch-box was not used, but, instead of it, the stop-rod finger acted on a loose piece or sliding frog; and instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box, in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's:—*Held*, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent.

ters patent, cause a specification to be inrolled in the Court of Chancery; sixthly, that the plaintiff by his petition represented to her Majesty that the invention was an invention of improvements in looms for weaving; that her Majesty, confiding in such representation, and in consideration thereof, granted the letters patent, and that the representation so made was false and untrue; seventhly, that the invention was not of any use, benefit, or advantage whatsoever to the public. The plaintiff joined issue on the first, second, fourth, and fifth pleas, and replied to the third, sixth, and seventh by traversing the allegations contained therein respectively.

The defendant's notice of objections was in terms similar to the pleas.

At the trial, before *Wightman, J.*, at the Liverpool Summer Assizes, 1849, it appeared that the patent in question was granted to the plaintiff in March, 1845, and that the specification, after reciting the letters patent, proceeded as follows:—

“My improvements in looms for weaving apply to that class of such machinery now commonly called or known as ‘power-looms,’ and consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom, whenever the shuttle ‘stops in the shed;’ that is to say, whenever it does not complete its course from one shuttle-box to the other. In ordinary power-looms this object is effected in the following manner:—Each shuttle-box is provided with what is called a ‘swell,’ (which projects from the outside of the shuttle-box whenever the shuttle is in the box,) against which a small lever fixed upon the ‘stop-rod’ bears; upon the stop-rod is also fixed another small lever or finger, which (whenever the shuttle is absent from both boxes at once, and consequently the ‘swell’ does not project), falls down and comes in contact with a stock-piece called the

1850.
SELLERS
v.
DICKINSON.

1850.
 SELLERS
 v.
 DICKINSON.

'frog,' which is fixed to the framing, thus preventing the lathe or slay beating up any further and injuring the cloth. At the same time, a small apparatus fixed to the slay strikes against the 'spring-handle' of the loom, and causes it to shift the driving-strap from the fast pulley on to the loose one, and thus stop the action of the loom. The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the 'frog' (which is fixed to the framing), especially if the loom is working rather fast. In my improved arrangement the loom is stopped in the following manner:—I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever, which bears against the 'swell;' but instead of its striking against a stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. This lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft, at the same time that a projection on the lever strikes against the 'spring-handle,' and shifts the strap. Simultaneously with these two movements, the lower end of the vertical lever causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock, at whatever speed the loom may be working. But, in order that my improvements in looms for weaving may be perfectly understood, I have attached to these presents a drawing, in which Fig. 1 is a plan view (as seen from above) of part of a power-loom with my improved arrangement applied there-

1850.
 SELLERS
 v.
 DICKINSON.

to; and Fig. 2 is a side or end view of the same. These figures are drawn to a scale of about six inches to the foot; and, in order more clearly to illustrate my invention, the new parts are represented as shaded with colour, the ordinary parts of the loom being drawn in outline only. *a a* is the main or side framing of the loom; *b* is the yarn-roller or beam; *c* the crank-shaft; *d* one of the shuttle-boxes; *e* the breast-beam; and *f* the cloth-roller. Upon the crank-shaft *c* the pulleys *g* and *h* are mounted as usual, except that the pulley *g*, which in ordinary power-looms is keyed fast upon the crank-shaft, is in this instance placed loose upon the same, and is connected with it by means of a clutch-box, one half, *i*, of which is cast on to the pulley *g*, and the other half, *k*, slides upon a feather or key, *l*. The clutch-box is thrown out of gear for the purpose of stopping the loom, in the following manner:— Upon the stop-rod *m* (see Fig. 2) are fixed the stop-rod fingers *n* (of which only one is shewn in the drawing, the other being at the other end of the loom), which, whenever the shuttle is absent from both boxes at once, and consequently neither ‘swell’ projects, falls down and comes in contact with a stop or notch *o*, at the upper end of the vertical lever *p*. This lever *p* is mounted upon a pin or stud at *q*, and is furnished with a small roller or bowl, *r*, which, acting against the projection upon the end of the lever *s*, will cause the lever to vibrate upon its centre and draw the clutch *i* out of contact with the clutch *k*, thus allowing the pulley *g* to revolve loosely upon the crank-shaft; at the same time the projection *t*, at the top of the lever *p*, will strike against the ‘spring-handle’ and shift the driving-strap on to the loose pulley *h*, as usual. Simultaneously with these movements, the break *u* is brought into contact with the fly-wheel *v*, in consequence of its being fixed to the bell-crank lever *w*, mounted upon a fulcrum at *x*, the lower end of which lever is connected to the lever *p* by the link *y*: *s* is a spring for the purpose

1850.
SELLERS
v.
DICKINSON.

of keeping the two halves, *i* and *k*, of the clutch-box in gear, except when thrown out as above described. Having now described the nature and object of my said invention, together with the manner of carrying the same into practical effect, I would observe, that I claim as my invention the above-described novel arrangement of mechanism for stopping the loom whenever the shuttle does not complete its course from one shuttle-box to the other, by disconnecting the main driving-pulley from the driving-shaft; and also the method of bringing a break into connection with the fly-wheel, for the purpose of preventing the lathe or slay from 'beating up' any further, and injuring the cloth by the shuttle stopping in the shed, or between the warp threads."

It was proved, that in power-loom weaving it sometimes happened that the shuttle failed to travel from one box to the other, in which case it became important to stop the action of the machine. In the original power-loom, when the shuttle was absent from the box, and was trapped in its course, the stop-rod finger, not being elevated, came in contact with a "frog" fixed to the frame of the loom, and arrested the progress of the slay at such a point as to prevent the shuttle breaking the warp threads, at the same time throwing the spring-lever handle out of its place, and passing the strap from the fast on to the loose pulley. That was attended with so violent a concussion as frequently to break various parts of the machinery. By the plaintiff's invention, the whole of the momentum imparted to the slay, and consequently to the stop-rod finger, is received on the notch at the upper part of the vertical lever, and, by that means, is transmitted to the break, which, being suspended on a point, is brought in contact with the periphery of the fly-wheel, and immediately stops the machinery without the slightest shock. The arrangement has this peculiar property: that, the higher the velo-

city, the intensity of the momentum increasing, the greater is the action of the break on the wheel. The clutch-box is a well-known mechanical operation for stopping and setting on the power, but its application as combined with the break is new. Before the plaintiff's invention, breaks of various kinds had been used to stop the fly-wheel, but no break had been applied in the manner the plaintiff applied it; namely, by employing the momentum of the slay, through the medium of the finger of the stop-rod, to put a break on the fly-wheel.

In September, 1848, the defendant obtained a patent for "certain improvements in and applicable to looms for weaving," and, amongst them, he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus the clutch-box was not used, but instead of it, the stop-rod finger acted on a sliding-piece, or loose frog; and instead of a rigid vertical lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever; and, by reason of the pin travelling on an inclined plane, the break was applied on the wheel gradually, and not simultaneously. The defendant's specification relating to this part of the claim was as follows:—

"My improvements consist of a certain novel construction and arrangement of apparatus, whereby the loom is thrown out of gear and its motions suspended when the shuttle fails to complete its traverse from one shuttle-box to the other, and remains in the shed while the reed is beating up. In ordinary power-looms this is effected by the contact of the 'finger' of the 'stop-rod' with the 'frog,' a rod or projection from the latter striking the 'spring-handle' and traversing the driving-strap from the fast to the loose pulley, or by allowing the reed to swivel in the top rail or slay-cap, and making a springjoint in the back-board of the shuttle-race, the combined action of which

1850.
 SELLERS
 v.
 DICKINSON.

1850.

SHELLERS

v.

DICKINSON.

operate by the intervention of levers upon a stop-rod, and placed beneath the bed of the slay, the finger of which, when the shuttle is caught in the shed, acts upon the spring handle, and effects the stoppage of the loom. The characteristic features of this part of my invention are—that, by a simple arrangement, the advantages of the ‘fast’ and ‘loose’ reed-loom are combined; that it is suited to the manufacture of light or heavy fabrics, from the circumstance that the reed is fast or immovable so long as the shuttle performs its duty (and is therefore equal to beat up cloth of any strength); but that, when the shuttle traps, or is caught in the shed, the reed, yielding to the pressure of the shuttle, swivels in the slay-cap, and the loom is immediately stopped, without injury to the warp or weft. The absence of the shuttle from the shuttle-box while the reed is beating up permits a small finger or detector to act upon the spring handle of the loom, and, simultaneously with the traverse of the driving-strap from the fast to the loose pulley, applies a break to the periphery of the fly-wheel. These operations are effected with a fast back-board to the shuttle-box, and an ordinary swell therein, which latter is acted upon by the shuttle at every prick, while the slay-sword is neither recessed or cranked, and the stop-rod fixed beneath the slay is dispensed with. As the brake levers which I make use of are elastic in their action, it will be found, that, so soon as the frog is liberated from contact with the stop-rod, or the spring handle is placed in the working position, the fly-wheel is also relieved from the pressure of the brake, and the loom is prepared to resume its operations.”

It was objected, on the part of the defendant, that the plaintiff’s specification did not sufficiently state the nature of his invention; that, if the claim was for the combined action of the clutch-box and the break, there was no infringement of that combination; if the claim was for the several parts of the machinery, then, the clutch-box, being old, the

patent was too large. The learned Judge told the jury that the claim of the plaintiff was not for the principle either of stopping power-looms by means of the clutch-box, or of stopping them by means of a break upon the fly-wheel, but it was for a novel arrangement of mechanism designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed, without such a concussion as would endanger or damage the machinery; that, if the question were whether the defendant had imitated the combined action of the clutch-box and the break, undoubtedly he had not infringed the plaintiff's patent, for he had left out the clutch-box; and his Lordship left to the jury the following questions:—"Is the plaintiff's arrangement of machinery for stopping looms, by means of the action of the clutch-box in combination with the action of the break, as described by the plaintiff, new? Is it useful? Is the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel new? Is it useful? Is the arrangement of machinery for bringing a break into connection with the fly-wheel in the machines made by the defendant the same substantially as the plaintiff's arrangement of machinery for that purpose?" The jury answered all these questions in the affirmative; whereupon his Lordship directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a verdict for him, if the Court should be of opinion that the plaintiff was not entitled to recover.

Watson, in the following Michaelmas Term, obtained a rule nisi accordingly, and also for a new trial, on the ground of misdirection; against which

Martin, *Atherton*, and *Webster* now shewed cause.—First, the specification is good. The language of a specification ought not to be strictly scanned; the proper mode of looking at it is to see whether what is claimed as the in-

1850.
SELLERS
v.
DICKINSON.

1850.
 SELLERS
 v.
 DICKINSON.

vention is there distinctly and clearly explained: *Newton v. The Grand Junction Railway Company* (a). Here the plaintiff claims as his invention a "novel arrangement of mechanism for stopping the loom whenever the shuttle does not complete its course from one shuttle-box to the other;" and that is accomplished by disconnecting the main driving-pulley from the driving-shaft, and by bringing a break in connection with the fly-wheel. It is true that the use of the clutch-box is old; but the claim is not for the two things, but for a novel arrangement, consisting of the combined action of the clutch-box, and the break upon the fly-wheel; and that the jury have found to be new and useful. The case is distinguishable from *Templeton v. Macfarlane* (b), for there the patentee by his specification claimed two processes, one of which was old; if his claim had been for a new mode of arranging old materials, the patent might have been supported.

Secondly, the defendant has infringed the plaintiff's patent. It is clear that a new combination of old mechanism, so as to produce a new effect, may be the subject of a patent, and whilst it is in force, another person cannot use any part of that combination which is new. In *Hindmarsh on Patents* (c), it is said, "In order to make out his case, it is not necessary that the plaintiff should shew that the defendant has used or exercised the whole of the art or invention comprised in the patent; it is sufficient if he can shew that the defendant has used any part of it." The correct principle is thus laid down by *Tindal, C. J.*, in his address to the jury in *Walton v. Potter* (d): "Where a party has obtained a patent for a new invention, or a discovery he has made by his own ingenuity, it is not in the power of any other person, simply by varying in form, or in immaterial circumstances, the nature or subject-matter of that discovery, to

(a) See post, p. 331.

(b) 1 H. L. Cas. 596.

(c) Page 489.

(d) 1 Webst. Pat. Cas. 586.

obtain either a patent for it himself, or to use it without the leave of the patentee, because that would be in effect and in substance an invasion of the right; and therefore, what you have to look at upon the present occasion is, not simply whether in form, or in circumstances that may be more or less immaterial, that which has been done by the defendants varies from the specification of the plaintiff's patent, but to see whether in reality, in substance and effect the defendants have availed themselves of the plaintiff's invention, in order to make that article which they have sold in the way of their trade." *Newton v. The Grand Junction Railway Company* (a) is an express authority to shew that there may be an infringement of part of a combination of old materials, that part being new and useful.

1850.
 SELLERS
 v.
 DICKINSON.

Watson, Crompton, and Cowling, in support of the rule.—The main question depends on the construction to be put upon the specification. If the claim is for an arrangement or combination of known materials, there has been no infringement of that combination; but if the claim is for the several parts described in the specification, then, one of those parts not being new, the patent is void. The presumption is, that the claim extends to the whole and to each part. The rule is thus laid down by Lord Abinger, C. B., in *Carpenter v. Smith* (b): "It is required as a condition of every patent, that the patentee shall set forth in his specification a true account and description of his patent or invention; and it is necessary in that specification that he should state what his invention is, what he claims to be new, and what he admits to be old; for if the specification states simply the whole machinery which he uses, and which he wishes to introduce into use, and claims the whole of that as new, and does not state that he claims either any particular part, or the combination of the whole

(a) See post, p. 331.

(b) Webster's Pat. Cas. 532.

1850.
 SELLERS
 v.
 DICKINSON.

as new, why then his patent must be taken to be a patent for the whole and for each particular part, and his patent will be void if any particular part turns out to be old, or the combination itself not new." That is in accordance with the decision in *Templeton v. Manfurlane* (a). In *Hill v. Thompson* (b), which is stated by Abbott, C. J., in *Brunton v. Hawkes* (c), to have undergone great consideration, Lord Eldon, C., said, "There may be a valid patent for a new combination of materials previously in use for the same purpose; or for a new method of applying such materials. But in order to its being effectual, the specification must clearly express that it is in respect of such new combination or application, and of that only, and not lay claim to the merit of original invention in the use of the materials." This specification in substance states that the mode in which the improvements are effected is by a combination of some part of two processes (which had been used before), the one for the purpose of stopping the momentum already given, and the other for preventing a further accumulation of power to the loom. The patentee claims as new the clutch-box applied to those purposes; but that use of the clutch-box had been long known. If, however, the clutch-box is not claimed separately, then the claim is for a combination of two things, namely, the clutch-box and the break; and the defendant cannot be guilty of an infringement of the patent by using only one of them. The passage cited from Hindmarsh on Patents has reference to an infringement of some part of that which is claimed as the invention; but if this is a claim for an arrangement or combination of known materials, the defendant has not used that combination.

POLLOCK, C. B.—The rule ought to be discharged. The question resolves itself into two points: First, whether there

(a) 1 H. L. Cas. 596. (b) 3 Mer. 622. (c) 4 B. & Ald. 541.

is any objection to the specification: Secondly, whether the patent has been infringed. In deciding those points, we must bear in mind that the jury have found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box in combination with the action of the break, is new and is useful; also that so much of the plaintiff's arrangement of machinery as the defendant has used, namely, that for bringing a break into connection with the fly-wheel, is substantially the same as the plaintiff's arrangement of machinery for that purpose, and, in addition, is of itself new and useful. Upon those findings, and referring also to the specification, I have no difficulty in coming to the conclusion that the verdict ought to stand. Whether upon the evidence the jury were justified in so finding, it is not necessary to express an opinion, because the rule was not obtained on the ground of the verdict being against evidence. All that we have to consider is the conclusion which in point of law we ought to arrive at, with those facts so found before us.

The point to which I shall first address myself is, whether the specification is good. With the facts so found, I am of opinion that the specification is perfectly good. The first finding of the jury is, that the arrangement of machinery for stopping looms by means of the action of the clutch-box in combination with the action of the break is new and useful. Then, is that sufficiently specified? It seems to me it is. The invention of the plaintiff is in one point of view single. He calls it "my invention of certain improvements in looms for weaving;" but he says the improvements apply to that class of machinery known as power-looms, and consist in "a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then describes the way in which he does it. He says that the common mode is performed in a certain manner; and he then goes on to de-

1860.

SHELLER
v.
DICKINSON.

1850.
 }
 SELLERS
 v.
 DICKINSON.

scribe his mode of separating the machine from the moving power by means of a clutch-box; and he associates with that a break, the effect of which he thus expresses:—"Simultaneously with these two movements, the lower end of the vertical lever causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock, at whatever speed the loom may be working." Then comes his claim; and I must say, that though at first I doubted whether the claim consisted of two parts or of one only, yet, on reading the specification with that candour and indulgence with which a specification should be read, it appears to me to consist of one only. He says, "I claim as my invention the above-described novel arrangement of mechanism;" and we must understand the expression "novel arrangement" to mean the same thing in the latter part of the specification as in the former; and it is clear that in the former it means one thing only. He says, my invention "consists in a novel arrangement of mechanism for instantly stopping the loom." Then he mentions the occasion when that would be required, viz. "whenever the shuttle does not complete its course from one shuttle-box to the other," by disconnecting the main driving-pulley from the driving-shaft; "and also," (which ought to be read "*and by*") the method of bringing a break into connection with the fly-wheel, for the purpose of preventing the lathe or slay from beating up any further and injuring the cloth by the shuttle stopping in the shed or between the warp threads." That being the case, the specification is free from objection.

The next point is, whether there has been any infringement of the patent. The argument addressed to us was, that this is a patent for a combination of old and new mechanism, and the defendant not having used the combination, there can be no infringement. But that is not so. There may be an infringement by using so much of a com-

1850.
 SELLERS
 v.
 DICKINSON.

bination as is material, and it would be a question for the jury whether that used was not substantially the same thing. I recollect a case in which a patent was taken out for an invention, a part of which, though supposed in the first instance to be useful, was soon found to be prejudicial, and was afterwards left out; but the patent was nevertheless sustained^(a). Now, suppose that had been a mere combination of matters entirely new as a combination, but all of them old singly, I cannot help thinking that if the jury had found that the substantial parts of the combination were used, that would have been an infringement of the patent. Looking at this in the spirit with which we ought to view a patent for the purpose of deciding the rights of the parties, what is this patent for? It is for a mode by which the inventor seeks to separate the machine from the source of power, and at the same time to stop the momentum which has already accumulated, and to do that by one and the same operation: in fact, to make the machine itself do it. Whenever the occasion arises, by the shuttle remaining among the sheds, and not arriving at the shuttle-box, the machine is so constructed that one and the same operation throws it out of gear and at the same time applies a break to the fly-wheel, so as to stop the momentum. The defendant has substituted for the clutch-box the old plan of the 'frog,' and instead of separating the power and the machine by a clutch-box, and so throwing the machine out of gear, he has followed the old mode of throwing off the strap, but he has adopted the more important and substantial improvement of the break, which the jury have found is in itself an arrangement of machinery new and useful. What would have been the effect if the clutch-box had been entirely new, and the plaintiff had complained of its use only, we are not now called upon to say; but I think it may be laid down as a general propo-

(a) Probably *Lewis v. Marling*, 4 C. & P. 52; 10 B. & C. 22.

1850.

SHELLERS

v.

DICKINSON.

sition, (if a general proposition can be laid on a subject applicable to such a variety of matters as patent law,—matters, indeed, incommensurable with each other, for the same doctrine which would apply to a medicine would scarcely apply to a new material or a new metal,) that if a portion of a patent for a new arrangement of machinery is in itself new and useful, and another person, for the purpose of producing the same effect, uses that portion of the arrangement, and substitutes, for the other matters combined with it, another mechanical equivalent, that would be an infringement of the patent. Such is the case in the present instance. It appears to me, with reference to the facts found by the jury, that the specification is good, and that the defendant has infringed the patent.

ROLFE, B.—I am also of opinion that the rule ought to be discharged. The first question is, what is the construction of the specification; because when that is once ascertained, the rest follows as of course. In my opinion, what the patentee claims is a matter entirely new, subject to a qualification which I shall presently mention. I come to that conclusion on reading the specification as a person of ordinary understanding would do, not loosely conjecturing anything, but, at the same time, not scanning it as if it were a special plea. I must farther say, that in my experience I never saw a fairer specification, or one more calculated fully and clearly to express what the invention is. The plaintiff begins by saying, that his improvements “consist in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed.” It is well known, that, in working the powerloom, it occasionally happens that the shuttle gets entangled in the warp, and if the machine be not instantly stopped, the whole fabric is liable to be damaged. The plaintiff then proceeds to tell in what mode that has hitherto been

1860.
 SALTERS
 v.
 DICKINSON.

effected; and for this purpose it is not necessary to consider whether he has in point of fact correctly stated the mode, but in construing what his improvements are, we must consider them with reference to that which he describes as the present mode, and which he says is this. [His Lordship read that part of the specification.] In plain language, formerly there was such a contrivance of machinery, that whenever the shuttle got entangled, in an instant a certain part of the machine, which he calls the "finger," struck against a thing called the "frog," which was fixed to the frame-work of the machine, the effect of which was to throw the work out of gear, by throwing the strap off the fast pulley on to the loose pulley. Having thus stated what he considered the old mode, he next states what he conceives to be the defects of that mode. [His Lordship read that portion of the specification.] Then, having stated that his object is to introduce some improvements which shall have the same effect of stopping the machine, but without the violent shock, he says the mode he proposes is this: [His Lordship read that part of the specification.] That is to say, whereas heretofore the strap has been thrown off by the finger striking against the frame-work, and by a certain apparatus which shifted it from the fast pulley on to the loose pulley, now I contrive to avoid that shock, by making the finger strike on a vertical lever, vibrating on a pin or stud, and not on a part of the frame-work; the result of which is, that by a certain arrangement, afterwards described, the strap is thrown off. I do not see that the clutch-box is claimed as an invention. He conceives that the best mode of fixing on the machinery is with a clutch-box; and in substance he says, my improvement, which mainly consists in striking the vertical lever, whether in connection with a clutch-box or not, has the effect of throwing the machine out of gear, as was done before, but without the violence of the shock. And he then adds, "Simultaneously with these two movements, the break is

1850.
SHELLERS
v.
DICKINSON.

brought in contact with the wheel." [His Lordship read that part of the specification.] It is wrong to suppose that in this specification the words "stopping every motion of the loom" necessarily mean the moving power. They are used very generally for "stopping the momentum which the machine has acquired." Then, what is it the plaintiff has claimed? Why, whereas formerly the mode of stopping the machine was by throwing off the strap by means which caused a violent jar, I have introduced an arrangement of machinery which shall have the same effect of throwing off the strap as before, but without that jar; and I mention a clutch-box because I consider that the best mode of fixing on the wheels; and simultaneously I introduce that which the jury have found to be a complete novelty. I check the momentum already acquired, by making the same machinery apply the break to the fly-wheel. Can anything be more clear? It seems to me wholly a new invention; except, indeed, if the plaintiff had proceeded against any person for using the clutch-box, or for throwing the strap off the pulley, he could only have succeeded by shewing that they had done so by means of the vertical lever. The whole of the application of the break is a novelty; as to the other part, he does not profess it to be a novelty: on the contrary, he states exactly how it was done before, and points out what his distinctions are, and then, after having described in detail the mode of making the machinery operate, he says, "I claim as my invention," &c. [His Lordship read that portion of the specification.] It seems to me, therefore, that, looking at the construction of this specification, what the plaintiff claims is a new invention altogether, by making the stoppage consist in the striking of a finger (nearly, but not quite, in the same position as in the old machine), not against the framework, but against a lever arranged in the mode which he has detailed in that part of the specification which I have referred to, and which has the same effect that the former

machine had, of throwing the strap off, whether there be a clutch-box or not; and then there is introduced a new element altogether, namely, a break, which at the same time that the machinery is put out of gear, has the effect of stopping the fly-wheel. That is the construction of the specification. Then I think, that when the complaint is, that the infringement has been of that which is found to be entirely new, the learned Judge was perfectly right in his direction to the jury. The question was not whether there had been any infringement of the combined action of the clutch-box and the break, but whether the defendant imitated that one thing, namely, the application of the break to the fly-wheel through the momentum of the slay. For that reason, there having been no misdirection, there can be no new trial, and the specification being good, the rule must be discharged.

1850.
 SELLERS
 v.
 DICKINSON.

PLATT, B.—I am of the same opinion. Until the year 1845 there was no means of stopping the power-loom when the shuttle failed to perform its course, without causing a violent shock. The plaintiff applied his ingenuity to the subject, and elaborated a mechanical contrivance for stopping the loom instantaneously, and without any shock. That is effected by a combination of machinery which the jury have found to be new and useful, and by which at the same moment the loom is put out of gear and the fly-wheel is instantaneously stopped by a pressure equivalent to the velocity of the machine at the time; because we all know that the momentum of the machine depends on the quantity of matter multiplied into the velocity, and the quantity of matter being always the same, of course the pressure would be in proportion to the velocity of the machine. The counteracting force which would be used for destroying its momentum, would always be in proportion, and therefore it would create an absolute stability,—or rather, it would produce actual quiet; because two forces

1850.
 SELLERS
 v.
 DICKINSON.

of the same amount, opposed to each other in opposite directions, destroy each other. Certainly a most ingenious invention. Then the next question is, whether the plaintiff, having made this invention, has properly described it in his specification. He first points out the object of his improvements, namely, "*instantly stopping*" the whole of the working parts of the loom whenever the shuttle stops in the shed. Then, after giving an account of the mode in which looms were stopped up to that time, he states the manner in which he proposes to do it; and then he concludes by stating that, simultaneously with these two movements, the break is brought in contact with the fly-wheel. Surely any one who reads that specification must understand what the object of the invention was; and the mode by which it is to be effected is most minutely described. Then what does the plaintiff claim? He says, "I claim as my invention the above-described novel arrangement of mechanism." What for? "For stopping the loom whenever the shuttle does not complete its course from one box to the other." Then he shews how that is done: "by disconnecting the main driving-pulley from the driving-shaft; and also by the method"—which the context requires to be read, "and by the method of bringing a break into connection with the fly-wheel, for the purpose of preventing the lathe or slay from beating up any further," &c. Therefore, it seems to me that the specification most distinctly describes the invention; and the jury having found that it is new and useful, and that the act of the defendant was substantially an infringement of it, the rule ought to be discharged.

Rule discharged (a).

(a) The following case, which was referred to on the argument, was decided in Hilary Term, 1846,

but has not been hitherto reported:—

1850.

NEWTON v. THE GRAND JUNCTION RAILWAY COMPANY.

CASE for the infringement of a patent for "certain improvements in the construction of boxes for axles or axletrees of locomotive engines and carriages, and for the bearings or journals of machinery in general."—Pleas (inter alia), not guilty; that the invention was not new; and that no sufficient specification was inrolled.

At the trial, before *Cresswell, J.*, at the Liverpool Summer Assizes, 1845, it appeared that the patent in question was granted to the plaintiff in May, 1843, and that the specification (so far as material) was as follows:—"This invention consists of certain improvements in the manner of making or constructing the boxes within which the gudgeons or journals of machinery of various kinds, and particularly the axles of railroad cars, of locomotive engines, and of other cars and carriages are to run; and those improvements are applicable not only to boxes for axles or gudgeons, which are divided so as to form semi-cylinders, but also to boxes, bearings, or sockets that are not divided, and which form a continuous circle, and also to sockets which are square, or of any other desired form, and within which a rod or bar is to slide, as, for example, the guide-rods used in locomotive and other steam engines. The boxes in which the gudgeons or axles are to run are to be formed and prepared in the ordinary way of those which are to be received into the housings or plummer-blocks of locomotive engines, cars, and other machinery, they being made of brass, bell metal, or any other metal or metallic compound which has sufficient strength and is capable of receiving a coating of tin. The inner parts of these boxes are to be lined with any of the harder kinds of metallic compounds or alloys, known under the names of britannia metal or pewter, and of which compounds or alloys block tin is the basis. An excellent compound or alloy for this purpose may be prepared by taking about fifty parts of tin, five of antimony, and one of copper; but other compounds or alloys analogous in character may be used. To prepare the boxes for this composition, they are to be cast with projecting rims or fillets along their interior edges, and on their ends within their semi-cylindrical parts, or on the ends only of the boxes or sockets when they are not divided. The interior of these boxes, and the ledges, fillets, or rims above named are then to be cleaned and tinned in the usual way of performing that operation. A cylindrical or semi-cylindrical core of the exact size (in its cylindrical part) of the gudgeon or axle which is to run within the bearing, or of such shape and dimensions as may be necessary for the sockets of a slide, or of the stem of a valve, is then to be taken, and upon such core the box to be lined is to be placed in such manner as that the core shall coincide within the situation that the axle or gudgeon, slide or stem is to occupy within such box when in use. The boxes are to be of such size as that, when the core is so placed, it shall not touch, but shall be nearly in contact

Where a patent is granted for a combination of several things, some of which are old and some new, the question of novelty depends upon whether that which is claimed in the specification as a whole is new. And a person who, by some chemical or mechanical equivalent, imitates a part of such combination which is new and useful, is guilty of an infringement of the patent.

1850.
NEWTON
v.
GRAND JUNCTION
RAILWAY
Co.

with the projecting rims or fillets; its distance therefrom may be about the thirty-second part of an inch, more or less. The ends of the boxes are then to be closed by any suitable means; so that the interior shall form a mould to receive the lining of composition, metal, or alloy, which is to be fused and poured into it, a proper aperture being prepared for that purpose. This aperture, in the boxes for railroad cars and locomotive engines, may consist of a hole an inch or more in diameter, left through their middles in the act of casting them, and in all cases the opening may be so proportioned as to suit the size of the box that is to be lined. The metallic composition, when melted and poured into the box, which has been prepared by being tinned, will unite firmly with its interior, and will cover the edges of the rims or fillets, so as to prevent contact between them and the gudgeons, axle, slides, or stems, which they are to receive, whilst the ledges will, at the same time, effectually prevent any tendency in the composition, metal, or alloy to spread from the weight or friction of the load, or the motion of a slide or stem. In boxes thus prepared, the heating and abrasion, which are so apt to occur in boxes so ordinarily constructed, do not take place, and their durability is consequently increased. By the employment of the metallic alloy in sheaves, and other articles of this description, and the substitution of a hard compound metal of copper and tin for the iron boxes and for the iron pins or axles upon which the sheaves are to run, the injurious consequences frequently resulting from the oxidation of the iron are obviated, such sheaves always turning freely on their pins or axles, whilst, when made of iron, they are often obstructed, and sometimes set fast, from the cause above named. I claim as the invention, making or constructing the boxes within which the journals or axles of machinery are to run, or within which the rods of slides, or the stems of valves, and other analogous parts of machinery are to slide, by providing them with rims or fillets along their edges and at their ends, or at their ends only, according to the nature and form of the box, in the manner and for the purpose herein set forth; and lining such boxes, prepared in such or a similar manner, with a metallic composition or alloy, of which tin is the basis, for the purpose herein fully made known and described. Instead of employing rims or fillets for the purpose of holding or retaining the metallic compound or alloy, other methods, such as knobs, projections, or holes may be adopted. I do not therefore intend to confine myself to the precise manner in which the invention is carried into effect; it is evident that the mode may be varied without departing from the nature of the invention."

Formerly, the boxes in which the axle-trees of locomotive engines ran were made of hard metal, chiefly brass, and consequently heating and abrasion existed to a great degree. That was obviated by the plaintiff's invention. The defendants, after the date of the patent, made boxes with a lining of tin for their locomotive engines; they

did not, however, make their boxes with rims or fillets, or any equivalent, nor did they use any alloy, but in the middle of the box, while the brass was hot, they rubbed a stick of tin, working it, not by a mould, but by a soldering-iron, so that it was thick in the middle and fined off to the edges. The learned Judge told the jury, that they must take the whole of that for which the patent was granted, including the fillets within the outer case, as well as the lining with tin and the soft metal, and say whether the invention was new. Also, that if a patent was granted for a new combination of several things known before, that did not prevent any one from using those parts which were old. That it was for the jury to say, whether the part here used by the defendants was substantially the same thing as the plaintiff's invention. They having found a verdict for the plaintiff, in the following Michaelmas Term a rule nisi was obtained to set aside the verdict, and for a new trial, on the ground (amongst others) of misdirection; against which,

1850.
 {
 NEWTON
 v.
 GRAND JUNCTION
 RAILWAY
 Co.

Baines, Martin, Adolphus, and Webster, shewed cause (a), (Jan. 29, 1846).—With respect to the question of novelty, they argued, that the patent was for a combination only, and therefore the jury were properly told to take the whole of that for which the patent was granted, and say whether it was new. As to the question of infringement, they argued that the invention consisted in the application of the soft metal to the hard metal, for the purpose of lessening friction; and that the rims or fillets were not an essential part of the patent, but merely the best mode of carrying out the invention; and that, according to the principle laid down in *Heath v. Unwin* (b), if a person substituted an equivalent, whether chemical or mechanical, for a part of an invention which was new and useful, that was an infringement.

Jervis, Crompton, and Cowling, in support of the rule, argued, First, That, upon the true construction of the specification, the claim was for lining the hard metal by means of rims or fillets, or by other mechanical means, so that the alloy might adhere; and that the learned Judge ought to have left it to the jury to say whether the application of the alloy, combined with the rims and fillets, was new. Secondly, That the plaintiff's was a mechanical, and the defendants' a chemical process; and that the use of a chemical equivalent was no infringement of a mechanical mode of producing a certain effect. At all events, the learned Judge should have left it to the jury to say whether the defendants had infringed the combination.

POLLOCK, C. B.—The rule ought to be discharged. The criterion to be applied on inquiring whether the subject-matter of a patent is novel,

(a) Before *Pollock, C. B., Alderson, B., and Rolfe, B.* (b) 13 M. & W. 583.

1850.
NEWTON
v.
GRAND JUNCTION
RAILWAY
Co.

is to look at the whole specification, and see what is there claimed. Now, referring to the language of this specification, it appears to me, that in substance what the patentee claims is the lining of these boxes with an alloy of tin, having certain provisions, partly mechanical and partly chemical, for keeping the lining in its place. That the mode adopted by the plaintiff is partly chemical, it is impossible to doubt, because he first tins the inside before the alloy is introduced; and the evidence was, that by means of that tinning, the alloy is made to unite with the hard metal, which it would not otherwise do. Therefore, I think the jury were correctly told that they were to consider whether the invention was new as a whole,—not whether it was new as to every part; because in modern times that is a novelty very rarely met with: the more general subject of a patent now is, some new combination or new application.

With respect to the question of infringement, it appears to me that the direction of the learned Judge was perfectly correct. If a Judge, when a patent case is before him, is to read a lecture on the natural philosophy which belongs to the patent, and to be strictly correct in every remark he makes, I am afraid that few verdicts in patent cases would stand. No doubt he is to construe the specification, and tell the jury what the patent is for; but it is for them to say whether the facts brought before them do or do not amount to an infringement. It was argued, that the same criterion is to be applied to the question of infringement as to that of novelty. But that is not so. In order to ascertain the novelty, you take the entire invention, and if, in all its parts combined together, it answer the purpose by the introduction of any new matter, by any new combination, or by a new application, it is a novelty entitled to a patent. But in considering the question of infringement, all that is to be looked at is, whether the defendant has pirated a part of that to which the patent applies; and if he has used that part for the purposes for which the patentee adapted his invention, and for which he has taken out his patent, and the jury are of opinion that the difference is merely colourable, it is an infringement. For these reasons it appears to me that there was no misdirection.

ALDERSON, B.—I am of the same opinion. In considering whether the invention is new, the proper mode is to take the specification altogether, and see whether the matter claimed as a *whole* is new. Now, the whole which may be new as claimed, may consist in some degree of old parts, and in some degree of new parts. The question of novelty, however, will depend on whether the whole taken together is new, though it may in part consist of old parts, provided the patentee does not claim the old parts, but only the combination of them and the new. If that be so, the learned Judge was perfectly correct in telling the jury that they were to take the whole of the specification into their consideration, for the purpose of determining whether the invention was a novelty.

Then, as to the infringement. There, undoubtedly, the question is altogether altered, because, where the invention consists partly of what is old and partly of what is new, the combination is the subject of the patent. Therefore, a person cannot infringe that part of the patent which is old, because the public cannot be prevented from using that which they had before used in that state. If the invention consists of something new, and a combination of that with what is old, then, if an individual takes for his own and uses that which is the new part of the patent, that is an infringement of it. The question left to the jury was, whether the part which the defendants had infringed was or was not a new part of the invention. That raises the question, whether the soft metallic lining, as applied to these boxes, was or was not a new invention. If the defendants had shewn that that part of the invention had been used before, that would have been an answer to the infringement, even though it might not have been a sufficient answer to the question of novelty; but, in my opinion, the evidence was materially in favour of the plaintiff.

1850.
 NEWTON
 v.
 GRAND JUNC-
 TION RAILWAY
 Co.

BOLFE, B.—I shall add very few observations; indeed I should have added none, had it not been for the way in which the matter was pressed by the defendants' counsel, as if, in construing the specification, the invention consisted of the rims or fillets, and the rest was a mere adjunct. They discussed and scanned the language of the specification in the same sort of spirit as if it were a plea or replication specially demurred to. That is not the spirit in which a specification should be inspected. The proper mode is to construe it, and see what is the good sense of it, and whether that which the patentee claims as his invention is there distinctly and clearly explained. It is true that here the plaintiff begins by describing the form of the boxes in which this lining is to be introduced; but, on looking to the whole specification, it is evident that what he means by "improved boxes" is boxes having a lining of soft metal, that lining being held in its place in the best manner, which he points out. The learned Judge told the jury, that, in order to find the infringement, they must find that some part of the patent (which means some material part, and which was new), had been used by the defendants. There was no evidence of the defendants having used anything but the lining of alloy; therefore, when the jury found infringement, of necessity they found that it was a new invention.

Rule discharged.

Exchequer Reports.

TRINITY TERM, 13 VICT.

1850.

May 27.

MEAD v. BASHFORD.

To a plea of set-off in debt on simple contract, the plaintiff replied, as to 49*l.* 16*s.* 10*d.*, parcel of the debt, that the causes of set-off, so far as the same related to 49*l.* 16*s.* 10*d.*, did not accrue within six years, concluding with a verification. And as to the residue of the causes of action, the plaintiff says, that he was not nor is indebted, modo et forma; concluding to the country:—

Held, on special demurrer, that the replication was bad.

The plaintiff should in such case reply, that part of the sub-

ject-matter of the set-off is barred by the statute, and that he is not indebted to the defendant in any sum which (excluding the part so barred) equals the amount of the plaintiff's demand.

DEBT on simple contract.—Plea, that the plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the defendant in a large sum of money, to wit, 500*l.*, for work done, and for goods sold and delivered, and for money lent, &c., which said sum of money so due to the defendant equals the supposed debt above demanded, and all damages by the plaintiff sustained by reason of the detention thereof, and against which said sum of money so due to the defendant, he the defendant is ready and willing and hereby offers to set off and allow to the plaintiff the full amount of the last-mentioned debt and damages, according to the form of the statute, &c.—Verification.

Replication.—As to the plea of the defendant, so far as the same relates to the sum of 49*l.* 16*s.* 10*d.*, parcel of the debt in and by the declaration demanded, the plaintiff saith, that the supposed debts and causes of set-off in the plea mentioned, so far as the same relate to the said sum of 49*l.* 16*s.* 10*d.*, parcel &c., did not nor did any or either of them arise or accrue to the defendant at any time

within six years next before the commencement of this suit, modo et formâ.—Verification.

And as to the plea, so far as the same relates to the residue of the causes of action in the declaration mentioned, the plaintiff says, that he was not nor is indebted to the defendant, modo et formâ; concluding to the country.

Special demurrer, assigning for causes (amongst others), that the replication neither traverses nor confesses and avoids the plea. That it tenders immaterial issues; for the plaintiff might succeed on either of such issues, and yet may be indebted to the defendant in a sum equal to the debt in the declaration and damages. That the defendant cannot take any issue or issues on the replication; for whether, on the whole of such replication, or on both or either of the parts thereof, the issue or issues, or either of them, should be found in favour of the plaintiff or defendant, it would not affect the truth of the plea. That the first part of the replication, though by its commencement it purports to answer so much of the plea as relates to the sum in the introductory part of the replication mentioned, viz. 49*l.* 16*s.* 10*d.*, it does in effect and substance answer the whole of the plea. That the second part of the replication, though it purports by its commencement to answer the residue of the causes of action, does in effect and substance answer the whole of the last plea.

Peacock, in support of the demurrer.—The gist of a plea of set-off is, that the plaintiff is indebted to the defendant in an amount at least equal to the sum due from the defendant to the plaintiff. But here the plaintiff, by replying the Statute of Limitations to so much of the set-off as relates to a portion of his claim, and nil debet as to the residue, raises a different and immaterial issue. The plaintiff ought to have replied to the whole plea nil debet; in which case the defendant must have proved a debt due to him, not barred by the statute, equal to the amount

1850.
 MEAD
 v.
 BASHFORD.

1850.
 MNEAD
 v.
 BASHFORD.

which the plaintiff might prove. [*Platt, B.*—Under this form of replication, if the residue was not sufficient to out-top the plaintiff's claim, he would be entitled to recover, although the 49*l.* 16*s.* 10*d.* was not barred by the statute.] The case is similar to *Briscoe v. Hill* (a), where to a plea of set-off the plaintiff replied, that, except as to 97*l.* 12*s.* 4*d.*, parcel &c., he was not indebted, modo et formâ; and also to 97*l.* 12*s.* 4*d.*, parcel &c., that, before the pleading of the replication, the plaintiff had paid that sum into Court in a cross action brought against him by the defendant, which sum the defendant took out of Court in satisfaction; and that replication was held bad, on the ground that there was no averment in the plea that the monies therein mentioned, exclusive of the 97*l.* 12*s.* 4*d.*, were sufficient to meet the plaintiff's demand. A plea of set-off is not divisible, unless where, taken together with other pleas, it covers the whole of the plaintiff's demand: *Tuck v. Tuck* (b). In *Turnbull v. Pell* (c), the defendant pleaded, by way of set-off, that the plaintiff was indebted to him in a certain amount on a judgment recovered, concluding with a verification by the record; and in a certain other sum on a promissory note. The plaintiff replied, as to the former amount, nul tiel record, and as to the latter, never indebted; and the Court intimated a strong opinion that both plea and replication were bad. This point was also raised in *Fairthorne v. Donald* (d), but not expressly decided, both parties having consented to amend.—[He also cited 1 Wms. Saund. 338, n. (r).]

Lush, contra.—A plea of set-off is in the nature of a declaration in a counter action, and may consist of a multiplicity of claims, to each of which the plaintiff may have a different answer. Although the amount proved under a plea of set-off to the whole declaration does not cover the

(a) 10 M. & W. 735.

(b) 5 M. & W. 109.

(c) 2 Exch. 793.

(d) 13 M. & W. 424.

1850.
 MEAD
 v.
 BARNFORD.

plaintiff's demand, the defendant is still entitled to the benefit of it in reduction of damages: *Rodgers v. Maw*(a). Suppose, instead of an indefinite claim, the defendant had set off two promissory notes of 100*l.* each, the fact being that one of them was barred by the Statute of Limitations, and the other paid; if the plaintiff had replied to the whole plea the Statute of Limitations, it is evident that he could not, under that replication, prove that one of the notes was paid. But, by thus dividing his replication according to the subject-matter of defence, if he proves one branch of the replication and fails on the other, he would be entitled to judgment on the former and the defendant to judgment on the latter. [*Alderson, B.*—The true question is, whether there is a debt due from the plaintiff to the defendant, which, excluding that portion barred by the statute, equals the plaintiff's demand.] Then the defendant should by his rejoinder either deny that any part of the set-off is barred by the statute, or, admitting that it is barred, state, by way of new assignment to that branch of the replication, that the residue equals the plaintiff's claim. Under this form of replication, the defendant has all the advantage which he would have had under *nil debet*, with respect to an acknowledgment of the debt, to take the case out of the statute: *Gale v. Capern*(b). *Fairthorne v. Donald*, and *Turnbull v. Pell*, can scarcely be considered as authorities, for there the parties amended on the suggestion of the Court. In *Blakesley v. Smallwood*(c), the form of replication was the same as the present, except that there was a single conclusion with a verification to the whole; and on that ground only it was held bad.

Peacock, in reply.—Assuming that the 49*l.* 16*s.* 10*d.* is barred by the statute, if the defendant proved a further sum due to him equal to what the plaintiff proved, the

(a) 15 M. & W. 444.

(b) 1 A. & E. 102.

(c) 8 Q. B. 528.

1850.
MRAD
v.
BASFORD.

defendant ought to succeed on the whole cause of action; but, nevertheless, the plaintiff would be entitled to recover 49*l.* 16*s.* 10*d.*

Cur. adv. vult.

The judgment of the Court was, in the following Hilary Vacation (Feb. 26), delivered by

ALDERSON, B.—This case was argued in Trinity Term last, before Lord *Cranworth*, my Brother *Platt*, and myself. The question was, whether this replication is good on special demurrer. We think it is not. The gist of the plea of set-off is, that the plaintiff is indebted to the defendant in a sum equal at least to that which he is seeking to recover in this action. The plaintiff in his replication endeavours to meet this plea by dividing his demand (*not the set-off*) into two parts. As to 49*l.* 16*s.* 10*d.*, part of his demand, the plaintiff says, that the set-off, so far as relates to that sum, that is, to that portion of his demand, is barred by the Statute of Limitations. And, so far as it relates to the residue of his demand, the plaintiff says he is not indebted, *modo et formâ*.

Now, in the first place, though that part of the replication which insists on the statute purports to give an answer to the set-off only so far as relates to 49*l.* 16*s.* 10*d.*, part of the plaintiff's demand, yet what is asserted is, that the causes of set-off are barred by the statute; and if this be so, that part of the replication, though purporting to be replied only to 49*l.* 16*s.* 10*d.*, is in truth a replication to the whole plea; for if the causes of set-off, that is, all the causes of set-off, are barred by the statute, so as not to be an answer to the plaintiff's demand of 49*l.* 16*s.* 10*d.*, so neither can they be an answer to the rest of his claim.

But suppose this objection to be gotten over, and that the replication should be read as if it had been a statement, that as to 49*l.* 16*s.* 10*d.*, parcel of the plaintiff's de-

mand, the causes of set-off to a like amount are barred by the statute, this is obviously no answer at all to the defendant. It may be that items to that amount may be barred by the statute, and yet there may be remaining a set-off not barred, sufficient to equal the plaintiff's demand, which may be established by the proof. The only course open to the defendant on this replication, supposing his set-off to consist of sums not barred by the statute, equal to the plaintiff's demand, and also of sums to the amount of 49*l.* 16*s.* 10*d.*, barred by the statute, would be, that he should rejoin by stating in the nature of a new assignment, (which, perhaps, considering the peculiar nature of a plea of set-off, might, if justice required it, be allowed,) that the sums which he intended to set off against the 49*l.* 16*s.* 10*d.*, parcel of the plaintiff's demand, were other and different from the sums barred by the statute. But even if such a rejoinder would not be bad, as being a departure from the plea, or on any other ground, still the plaintiff has no right by such a replication to drive the defendant to take issue on matters which may be immaterial and which were not stated in the plea. What the defendant undertook to prove was, that his cross demand in its integrity equalled the plaintiff's whole claim when proved,—not that he had particular matters of set-off against particular parts of the plaintiff's original demand.

The course of pleading attempted by the plaintiff leads to this anomaly, that, though there will be two issues to be tried, each going only to a part of the cause of action, namely, first, whether there is a good set-off to a part of the cause of action arbitrarily selected by the plaintiff in his replication, and secondly, whether there is a good set-off to the residue; yet, if either of these issues is disposed of in favour of the plaintiff, it entitles him to judgment on the whole plea and the whole cause of action, and makes the result of the issue as to the other part wholly immaterial. This is clearly anomalous and bad.

1850.

MEAD
v.
BASHFORD.

1850.
MEAD
v.
BARNFORD.

The proper course for the plaintiff to have followed in this case is pointed out by my Brother *Parke*, in *Fairthorne v. Donald*(a). He should have replied, that part of the subject-matter of the set-off was barred by the statute, and that he is not indebted to the defendant in any sum which (excluding the part so barred) equals the amount of his demand. On pleadings so constructed, the defendant would have been bound to support his defence by shewing a set-off not barred by the statute, and which should equal or exceed the plaintiff's demand, which may be established by the proof. This is precisely what the plea bound him to prove, and no more. With respect to the case of *Blakesley v. Smallwood*(b), cited by Mr. *Lush*, it may be observed, that the Court there proceeded on the ground that the plaintiff had improperly concluded what was in fact a mere traverse with a verification. The replication there did not, as it does here, attempt to divide the causes of action, but only the causes of set-off, into two parts; and the Court there cautiously abstains from saying that the replication would have been bad if it had contained proper conclusions to its different parts. If the plaintiff chooses to amend on the usual terms, we think he should be at liberty to do so, but otherwise we think that our judgment ought to be for the defendant.

Amendment accordingly, otherwise

Judgment for the defendant.

(a) 13 M. & W. 424.

(b) 8 Q. B. 538.

1850.

May 22.

HUTCHINSON, Administratrix of JOSEPH HUTCHINSON, deceased, v. THE YORK, NEWCASTLE, AND BERWICK RAILWAY COMPANY.

CASE upon the statute 9 & 10 Vict. c. 93.—The declaration stated, that whereas before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of Joseph Hutchinson, the said Joseph Hutchinson was in the employ and service of the defendants; and while in such service and employ, the said Joseph Hutchinson, at the request of the defendants, and in the discharge of his duty as their servant, became and was a passenger in a certain railway carriage of the defendants, in and upon a certain railway of which the defendants were then possessed, to go in and by the said railway carriage from a certain place, to wit, Viego Bank Foot, to a certain other place, to wit, South Shields, which said railway carriage then was drawn in and upon the said railway by a certain locomotive steam-engine, and the said steam-engine and railway carriage then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf. And whereas also, before and at the time of the committing of the grievances hereinafter mentioned, and in the lifetime of the said Joseph Hutchinson, the defendants were possessed of a certain other locomotive

A master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, provided the latter be a person of competent care and skill.

Therefore, where a servant of a Railway Company, in discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he was killed:—*Held*, that his representative could not maintain an action against the Company under the 9 & 10 Vict. c. 93; and that it

made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both.

A declaration in an action under the 9 & 10 Vict. c. 93, stated that H. was in the employ and service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger in a railway carriage of the defendants, drawn by a steam-engine under the guidance of the defendants, to wit, by their servants; that the defendants were possessed of another steam-engine, which then was drawing other railway carriages, and which was under the guidance of the defendants, to wit, by their servants; yet the defendants conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and also in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed.—Plea, that the collision took place solely through the negligence of the servants of the defendants; and that the engines and carriage, at the time when &c., were respectively under the guidance of the servants of the defendants, who were fit and competent persons to have the guidance of the same; and that the negligence was wholly unauthorised by the defendants, and without their leave, licence, or knowledge:—*Held*, on special demurrer, that the plea did not amount to the general issue.

1850.
HUTCHINSON
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

steam-engine, which was then drawing divers, to wit, ten other railway carriages, in and upon the said railway, and the said last-mentioned locomotive steam-engine and railway carriages then were under the guidance, government, and direction of the defendants, to wit, by certain then servants of the defendants in that behalf; yet the defendants, well knowing the premises, heretofore and in the lifetime of the said Joseph Hutchinson, and after the passing of a certain Act of Parliament made and passed in the session of Parliament holden in the ninth and tenth years of the reign of her Majesty Queen Victoria, "for compensating the families of persons killed by accidents," to wit, on &c., behaved and conducted themselves in so negligent, careless, unskilful, and improper manner in and about the guidance, government, and direction of the said first-mentioned locomotive steam-engine and railway carriage in which the said Joseph Hutchinson was such passenger as aforesaid, and also in and about the guidance, government, and direction of the said other locomotive steam-engine, and of the said other railway carriages hereinbefore mentioned, that by and through the carelessness, negligence, unskilfulness, and default of the defendants and their servants in that behalf, and for want of due care and attention, the said last-mentioned locomotive steam-engine so drawing the said last-mentioned railway carriages as aforesaid, to wit, on &c., was violently driven upon and against and came into collision with the said railway carriage in which the said Joseph Hutchinson was such passenger as aforesaid, by means whereof the said Joseph Hutchinson then was greatly cut, crushed, and wounded, and of the said cuts, crushes, and wounds died, leaving him surviving the plaintiff, who before and at the time of his death was his wife, and Ralph Hutchinson, Elizabeth Hutchinson, &c., who before and at the time of his death were his children, to the damage of the plaintiff as such administratrix, &c.; and thereupon the plaintiff, as such administratrix,

and for the benefit of herself and of the said children of the said Joseph Hutchinson, according to the provisions of the said statute, brings her suit, &c.

Plea, that, at the said time when &c., the locomotive steam-engine in the declaration secondly mentioned was driven upon and against and came in collision with the said railway carriage in which the said Joseph Hutchinson was such passenger as in the declaration mentioned, in manner and form as in the declaration is alleged, solely by and through the carelessness, negligence, unskilfulness, and default of the said servants of the defendants in the declaration in that behalf mentioned, and for want of due care and attention by them, and not by or through any other negligence, unskilfulness, default, or want of due care and attention; and that the said engines and carriages in the declaration in that behalf mentioned, at the said time when &c., were respectively under the guidance, government, and direction of the said several servants of the defendants in the declaration mentioned, and of no other person or persons; and that the said several servants were then severally fit and competent persons to have the guidance, government, and direction of such engines and carriages as aforesaid respectively, as he the said Joseph Hutchinson at the said time when &c. well knew. And the defendants further say, that the said carelessness, negligence, unskilfulness and default, and want of due care and attention of the said servants of the defendants in the declaration in that behalf mentioned, at the said time when &c., and always, were wholly unauthorised by the defendants, and were entirely without the leave or licence, knowledge, sanction, or consent of the defendants.—Verification.

Special demurrer, assigning for causes that the plea is an argumentative denial of the cause of action, and amounts to the general issue.—Joinder therein.

1850.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY Co.

1850.
 HUTCHINSON
 v.
 YORK, NEW-
 CASTLE, AND
 BERWICK
 RAILWAY CO.

Hugh Hill argued in support of the demurrer in last Michaelmas Vacation (Dec. 7).—The first question is, whether the declaration is good. It may be conceded, that, unless the intestate could have sued, his administratrix cannot maintain this action. It is important, in the first instance, to ascertain what is the true principle of law where a servant has met with injury through the negligence of another servant of the same employer. The only reported case bearing on the point is that of *Priestley v. Fowler* (a). There the declaration stated, that the plaintiff was a servant of the defendant in his trade of a butcher; that the defendant had desired and directed the plaintiff, so being his servant, to go with and take certain goods of the defendant in a certain van of the defendant's then used by him, and conducted by another of his servants, in carrying goods for hire upon a certain journey; that the plaintiff, in pursuance of such desire and direction, accordingly commenced and was proceeding and being carried and conveyed by the said van with the said goods; and it became the defendant's duty to use proper care that the van should be in a proper state of repair and should not be overloaded, and that the plaintiff should be safely and securely carried thereby; nevertheless, that the defendant did not use proper care that the van should not be overloaded or that the plaintiff should be safely or securely carried; in consequence of the neglect of which duties, the van broke down, and the plaintiff was thrown to the ground and his thigh fractured; and it was held, on motion in arrest of judgment, that the action was not maintainable. That case, however, depends on this principle, that, where the common prudence and caution of man are sufficient to guard him, the law will not protect him in his negligence: 2 Smith's Lead. Cas. 69. Many of the instances there put as illustrations by Lord Abinger, were not cases

(a) 3 M. & W. 1.

of master and servant. [*Parke, B.*, referred to *Wigmore v. Jay*(a).] It may be, that where the damage is necessarily incident to the employment, the servant cannot maintain an action against his master for an injury arising out of it; but why should a servant be without remedy in cases where a stranger may sue? The declaration shews that no care or foresight of the deceased would have protected him. There was no personal negligence on his part. He had nothing to do with the guidance or management of the trains. If a servant is sent on an errand, and, while crossing the road, his master's carriage is, through the negligence of the coachman, driven over him, is he to be without remedy because he serves the same master? Or suppose a railway clerk is injured, while crossing the line in the performance of his duties as clerk. Where the injury does not result from danger so connected with the employment that the servant would be necessarily exposed to it, the master is liable. Here the deceased was a passenger in another train. The declaration alleges that the injury was caused by the negligence of the defendants, and that is admitted by the plea. It is immaterial that there was also negligence on the part of the drivers of the train in which the deceased was: *Bridge v. The Grand Junction Railway Company* (b), *Davies v. Mann* (c). [*Parke, B.*, referred to *Thorogood v. Bryan* (d).]

Secondly, the plea is bad on special demurrer. It confesses but does not avoid the cause of action. The declaration alleges that the deceased was in the performance of his duty as a servant of the defendants, and that the injury was caused by the negligence of other servants of the defendants. Those facts are admitted by the plea. The allegation, that the servants of the defendants were fit and competent persons to have the guidance of the en-

1850.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

(a) Post, p. 354.

(c) 10 M. & W. 546.

(b) 3 M. & W. 244.

(d) 8 C. B. 115.

1850.
 HUTCHINSON
 v.
 YORK, NEW-
 CASTLE, AND
 BERWICK
 RAILWAY CO.

gines, if any answer at all, is in effect a denial of the breach of duty. It is not alleged that the injury resulted from the conduct of the defendants themselves, but a constructive liability for the act of their servants is relied on; and if the law be that they are not liable for an injury done to one of their servants through the negligence of others, provided the latter be persons of competent care and skill, then the plea amounts to not guilty.

J. Addison, contra.—The plaintiff could not succeed at the trial, unless he proved that the injury was caused by the joint negligence of the persons in charge of the two trains. But the declaration is bad in substance. The reason why a passenger may maintain an action against the Company, while a servant cannot, is, that the Company have contracted with the former for his safe conveyance, while the latter, by entering into the service, virtually undertakes all ordinary risks incident to it. The present case is not distinguishable in principle from *Priestley v. Fowler* and *Wigmore v. Jay*. Indeed, it is difficult to see why a master should be responsible for the acts of his servants inter se. There is no duty or contract either expressed or implied. If a sailor were injured by the negligence of another sailor in the performance of his duty, could it be argued that the owner of the vessel was liable? Or suppose the case of two grooms riding together, and the one by his negligence injures the other. The Company might perhaps be responsible for gross negligence, if, for instance, they employed incompetent persons; but that is not the case here.

The plea does not amount to the general issue. The declaration alleges that the trains were under the direction of the defendants, and that by their negligence the injury was caused. The plea alleges that the trains were not under the direction of the defendants personally, but of their servants, and that they were persons of competent

care and skill; so that no responsibility attached to the defendants.

1850.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY Co.

Hugh Hill, in reply.—If it be necessary, in order to maintain the action, to prove gross negligence on the part of the Company, the declaration must be read as averring such negligence; and if the plea be taken as alleging that the defendants used ordinary care, that is bad as an argumentative denial of gross negligence. The declaration would be supported by proof of negligence on the part of the drivers of the train in which the deceased was not. Suppose the case of a collision between two carriages coming in opposite directions, by which a person in the highway was injured, and he brought an action charging them with joint negligence, if it turned out that one only was guilty of negligence, he would, nevertheless, be entitled to recover.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—This was an action under Lord Campbell's Act, brought by the plaintiff as administratrix of her deceased husband Joseph Hutchinson, to recover compensation from the defendants on the ground that he had met with his death by reason of the negligence of their servants. [His Lordship stated the pleadings.] On this record the question is, whether the defendants are liable for an injury occasioned to one of their own servants by a collision, while he was travelling in one of their carriages, in discharge of his duty as their servant, in respect of which injury they would undoubtedly have been liable, if the party injured had been a stranger travelling as a passenger for hire. We think they are not. This case appears to us to be undistinguishable in principle from that of *Priestley v. Fowler* (a). In that case the plaintiff was

(a) 3 M. & W. 1.

1850.

HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

the servant of the defendant, and had sustained an injury by the defendant having over-loaded a van, in which he the plaintiff was travelling by direction of defendant in discharge of his ordinary duties. That case was fully considered, and the Court, after a verdict for the plaintiff, arrested the judgment, on the ground that a master is not in general liable to one servant for damage resulting from the negligence of another; and some of the inconveniences, not to say absurdities, which would result from a contrary doctrine, were there pointed out. The principle upon which a master is in general liable to answer for accidents resulting from the negligence or unskilfulness of his servant, is, that the act of his servant is in truth his own act. If the master is himself driving his carriage, and from want of skill causes injury to a passer by, he is of course responsible for that want of skill. If, instead of driving the carriage with his own hands, he employs his servant to drive it, the servant is but an instrument set in motion by the master. It was the master's will that the servant should drive, and whatever the servant does in order to give effect to his master's will may be treated by others as the act of the master: "*Qui facit per alium, facit per se.*"

So far there is no difficulty. Equally clear is it, that though a stranger may treat the act of the servant as the act of his master, yet the servant himself, by whose negligence or want of skill the accident has occurred, cannot. And, therefore, he cannot defend himself against the claim of a third person; nor, if by his unskilfulness he is himself injured, can he claim damages from his master upon an allegation that his own negligence was, in point of law, the negligence of his master. The grounds for these distinctions are so obvious as to need no illustration.

The difficulty is as to the principle applicable to the case of several servants employed by the same master, and injury resulting to one of them from the negligence of

another. In such a case, however, we are of opinion that the master is not in general responsible, when he has selected persons of competent care and skill. Put the case of a master employing A. and B., two of his servants, to drive his cattle to market. It is admitted, that if by the unskilfulness of A. a stranger is injured, the master is responsible. Not so, if A. by his unskilfulness hurts himself; he cannot treat that as the want of skill of his master. Suppose, then, that by the unskilfulness of A., B. the other servant is injured while they are jointly engaged in the same service, there we think B. has no claim against the master. They have both engaged in a common service, the duties of which impose a certain risk on each of them; and in case of negligence on the part of the other, the party injured knows that the negligence is that of his fellow-servant and not of his master. He knew, when he engaged in the service, that he was exposed to the risk of injury, not only from his own want of skill or care, but also from the want of it on the part of his fellow-servant; and he must be supposed to have contracted on the terms that, as between himself and his master, he would run this risk.

Now, applying these principles to the present case, it follows that the plaintiff has no title to recover. Hutchinson, in the discharge of his duty as one of the servants of the defendants, had put himself into one of their railway carriages under the guidance of others of their servants, and by the neglect of those other servants, while they were engaged together with him in one common service, the accident occurred. This was a risk which Hutchinson must be taken to have agreed to run when he entered into the defendants' service, and for the consequences of which, therefore, they are not responsible. The declaration, indeed, states the accident to have arisen from the combined neglect of the servants who were managing the carriages in which the deceased was travelling, and of others of their

1860.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

1850.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

servants who were managing the train with which the plaintiff's carriage came into collision. And Mr. *Hill* argued, that this allegation is divisible, and that, in order to sustain the declaration, it would not be necessary to prove any negligence on the part of the train in which Hutchinson was travelling; that it would be sufficient to prove negligence on the part of the other train; and so he contended that, even admitting the defendants would not be liable for any neglect on the part of those who were managing the train in one of the carriages in which Hutchinson was travelling, yet there could be no principle exempting them from liability for the acts of those who, though equally with Hutchinson servants of the defendants, were not, at the time of the accident, engaged in any common act of service with him. But we do not think there is any real distinction between the two cases. The principle is, that a servant, when he engages to serve a master, undertakes, as between him and his master, to run all the ordinary risks of the service, and this includes the risk of negligence on the part of a fellow-servant, whenever he is acting in discharge of his duty as servant of him who is the common master of both. The death of Hutchinson appears on the pleadings to have happened while he was acting in the discharge of his duties to the defendants as his master, and to have been the result of carelessness on the part of one or more other servant or servants of the same master while engaged in their service; and whether the death resulted from the mismanagement of the one train or of the other, or of both, does not affect the principle: in any case it arose from carelessness or want of skill, the risk of which the deceased had, as between himself and the defendants, agreed to run.

It may, however, be proper with reference to this point to add, that we do not think a master is exempt from responsibility to his servant for an injury occasioned to him by the act of another servant, where the servant injured

was not, at the time of the injury, acting in the service of his master. In such a case the servant injured is substantially a stranger, and entitled to all the privileges he would have had, if he had not been a servant.

It was contended that the plea in this case is bad on special demurrer, as being but an argumentative denial of the cause of action stated in the declaration. But we think Mr. *Addison* successfully shewed this objection to be unfounded. Though we have said that a master is not in general responsible to one servant for an injury occasioned to him by the negligence of a fellow-servant while they are acting in one common service, yet this must be taken with the qualification that the master shall have taken due care not to expose his servant to unreasonable risks. The servant, when he engages to run the risks of of his service, including those arising from the negligence of fellow-servants, has a right to understand that the master has taken reasonable care to protect him from such risks by associating him only with persons of ordinary skill and care; and the object of the plea in this case is to shew that the defendants had discharged this duty, the omission to discharge which might have made them responsible to the deceased. The plea, therefore, appears to us not to be open to the objection insisted on. For these reasons we are of opinion that the plaintiff has shewn no ground of action, and so our judgment must be for the defendants.

Judgment for the defendants (a).

(a) See the next case.

1850.
HUTCHINSON
v.
YORK, NEW-
CASTLE, AND
BERWICK
RAILWAY CO.

1850.

May 22.

WIGMORE, Administratrix of CHARLES WIGMORE, deceased,
v. JAY.

The defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—*Held*, that no action could be maintained against the defendant under the 9 & 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose.

CASE upon the statute 9 & 10 Vict. c. 93.—The declaration stated, that the defendant carried on the business of a builder, and was employed in the way of his business to build a certain building, to wit, a wing to "The London University;" and thereupon, the defendant, being such builder and so employed, did construct and erect, and from thence until the giving way and breaking down of the same, kept and continued erected, a certain scaffold for the workmen and servants employed by him in the building of the said building, and of whom the said C. Wigmore was one, to carry on thereon and by means thereof the work of building the wall and other parts of the building, and for that purpose, and in the course of their employment, to be and continue upon the scaffolding with their tools, and with bricks, mortar, &c., at great heights above the ground; and thereupon it became and was the duty of the defendant to have and keep the scaffolding and every part thereof constructed of sound, safe, and sufficient materials and poles, and to take and use due and proper care and skill in that behalf, and otherwise in and about the constructing, erecting, and keeping of the scaffolding, to prevent the workmen and servants of him the defendant, while so employed upon the scaffolding at such great heights above the ground, from falling and being cast and thrown therefrom down to the ground by the giving way and breaking down of the scaffolding or any part thereof; nevertheless the defendant, not regarding his said duty, did not nor would have or keep the scaffolding constructed of sound, safe, or sufficient materials or poles, or take or use due or proper care or skill in that behalf or otherwise &c.; but, on the contrary thereof, the defendant negligently, wrongfully, and injuriously used a certain unsound and

decayed pole, he the defendant then and at all times afterwards having had notice that the same was unsound and decayed, to be and form a certain part of the scaffolding, to wit, one of the ledger or horizontal poles thereof, at a great height, to wit, at the height of forty-five feet above the ground; and the defendant so having notice of the premises, then negligently, wrongfully, and injuriously formed and constructed the said part of the scaffolding of such unsound and decayed pole, and negligently &c. kept and continued the said part so formed and constructed, and the same was and continued so formed and constructed, from thence until the giving way and breaking down of the same; and the defendant in that respect and otherwise took and used so little and such bad care and skill in and about the constructing, erecting, and keeping of the said part of the scaffolding, to prevent the said workmen and servants of him the defendant, while so employed upon the scaffolding, from falling and being cast and thrown from the said part thereof down to the ground, by the giving way and breaking down of the same, that C. Wigmore, then being one of the workmen and servants of the defendant, then employed by the defendant in the building of the said building, and being then in the course of his said employment on the said part of the scaffolding, to wit, the said ledger pole thereof, at such great height above ground as aforesaid, with his tools, and with bricks, mortar, &c. at work there, and carrying on then for the defendant the work of building a certain wall of the said building, by and through the said wrongful act, neglect, and default of the defendant, the said part of the said scaffolding, to wit, the ledger pole, so then being unsound and decayed, and in that respect and otherwise carelessly, improperly, and unskilfully constructed as aforesaid, did by reason thereof suddenly give way and break down, whereby the said C. Wigmore, so then being at work upon the said part of the scaffolding, at such height above the ground

1850.
WIGMORE
v.
JAY.

1850.
 WIGMORE
 v.
 JAY.

as aforesaid, then with great force and violence fell from such height down to and upon the ground, and was thereby then grievously and mortally hurt, bruised, &c., inso-much that, by reason of his said hurts, bruises, &c., he the said C. Wigmore, afterwards and within twelve calendar months next before the commencement of this suit, died, &c.—The declaration then stated in the usual form, that, by means of the grievances, the plaintiff and her infant children were deprived of the maintenance and support of their father.—Plea, not guilty.

At the trial, before *Pollock*, C. B., at the Middlesex Sit-tings after last Michaelmas Term, it appeared that the de-fendant, who was a master builder, had contracted to build the hall of the London University, and that the plaintiff's husband was one of the bricklayers employed by him for that purpose. The scaffold was erected under the superintendence of the defendant's foreman, the defend-ant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger or horizontal pole, in consequence of which the scaffold broke while the plaintiff's husband was at work upon it, and he was thrown to the ground and killed. The un-soundness of the pole had been previously pointed out to the foreman, but the deceased could not see its defect on account of some planks being laid across it. It was object-ed, on behalf of the defendant, that, on the authority of *Priestley v. Fowler* (a), the action would not lie. The learned Judge was of opinion, that, as the defendant had not personally attended to the erection of the scaffolding, the action could not be maintained, and he directed a ver-dict for the defendant.

Watson moved for a new trial, on the ground of misdi-rection, in the following Hilary Term (January 15).—

(a) 3 M. & W. 1.

Priestley v. Fowler (a) has no application here; for this is not the case of an injury done to a servant by the negligence of his fellow-servant. The persons who erected the scaffold were not the fellow-labourers of the deceased, who was merely employed to work on the scaffold of the defendant. The declaration alleges that it was the duty of the defendant to construct the scaffolding with safe and sound materials. [*Parke, B.*—The question is, whether that is a substantive averment, or a mere inference of law from the preceding facts.] If a material averment, the duty is admitted, because not traversed; but if the allegation is a mere conclusion of law, then the question arises on the record, whether that conclusion is warranted by the premises. In *Priestley v. Fowler* the duty alleged was similar to that of a common carrier; namely, that the defendant should safely and securely carry the plaintiff; and the Court decided that no such duty arose out of the relation of master and servant. Here the duty alleged necessarily arises out of the contract for service. The notice to the defendant is similar to an averment of a scienter, and is admitted by the plea. Not guilty only operates as a denial of the breach of duty or wrongful act; so that the plaintiff is entitled to the verdict, and the objection, if any, is only open on motion in arrest of judgment. [He also referred to *Hutchinson v. The York, Newcastle, and Berwick Railway Company* (b).]

1850.
WIGMORE
v.
JAY.

Cur. adv. vult.

POLLOCK, C. B., now said:—This case involves the same principle as that disposed of by the judgment of the Court in the case of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*. The doctrine laid down in *Priestley v. Fowler*, and affirmed in the last-mentioned case, applies to this. It appeared that the husband of the plaintiff

(a) 3 M. & W. 1.

(b) Ante, p. 343.

1850.

WIGMORE

v.

JAY.

was a workman employed by the defendant to assist in the erection of a building; and the cause of the accident was the misconstruction of a scaffold, in consequence of which a part of it broke, and the husband of the plaintiff fell to the ground and was killed. The person who had erected the scaffold, or assisted in the erection of it, was not suggested to have been a person deficient in skill, or an improper person to be employed for that purpose; and the ground on which the rule was applied for was, that the case of one servant injured by the negligence of another, in the course of their common employment, was not a case in which the party or his relatives were disentitled to recover damages against the master. We are of opinion, on a very full consideration of the case of *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, which has been delayed for some time with a view to give the subject the fullest consideration, that no such action lies. I need not observe that, in that case, the question is on the record, and therefore may be carried to a Court of error. The case of *Priestley v. Fowler* acquires additional authority from the same circumstance; for it was a case in which the Court arrested the judgment after verdict; and it does not appear that the plaintiff's counsel thought it right, even though a verdict had been obtained, to take it to a Court of error. Under these circumstances, we think there is no occasion to grant a rule in this case.

Rule refused.

1850.

May 27.

ROSS v. NORMAN.

CASE.—The declaration stated, that whereas the defendant, not having any reasonable or probable cause of action whatsoever against the now plaintiff, to the amount of the sum of money for which the now defendant maliciously caused the now plaintiff to be arrested, as hereinafter mentioned, but wrongfully and unjustly contriving and intending to imprison, harass, oppress, and injure the now plaintiff, and to cause and procure him to be arrested and imprisoned, and to compel him to find bail for his appearance, or to deposit his money as a security, according to the statute in that case made and provided, wrongfully, falsely, maliciously, and unjustly procured from the Hon. Sir *J. Patteson*, Knight, then being one of the Judges of her Majesty's Court of Queen's Bench at Westminster, a certain special order, directing that the now defendant, within a certain time, to wit, a fortnight from the date of the said order, should be at liberty to issue one or more writ or writs of *capias* into one or more different counties, against the now plaintiff, indorsed to hold him to bail for the sum of 15*l.* 18*s.* 7*d.*, by falsely and maliciously representing to the said Sir *J. Patteson* that the now plaintiff was justly and truly indebted to the now defendant in the said sum of 15*l.* 18*s.* 7*d.*, by means of a false affidavit, then shewn and uttered by the now defendant before the said Sir *J. Patteson*, in that behalf. And thereupon afterwards, to wit, on &c., and within the said fortnight from the date of the said order, the defendant wrongfully and maliciously caused and procured to be sued and prosecuted out of the said Court of our Lady the Queen, a certain writ of our said Lady the Queen, called a *capias*, directed to the sheriff of Middlesex, bearing date &c., by which said writ our said Lady

A declaration for a malicious arrest by *capias* under the 1 & 2 Vict. c. 110, stated that the defendant not having any reasonable or probable cause of action against the plaintiff to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously, and unjustly procured from a Judge an order for a *capias*, by falsely and maliciously representing to the Judge that the plaintiff was justly and truly indebted to the defendant in a certain sum, by means of a certain false affidavit then shewn and uttered by the defendant before the Judge; and thereupon maliciously caused a *capias* to be issued, and without any reasonable or probable cause of action, caused the plaintiff to be arrested:—*Held*, on special demurrer, that the declaration was sufficient, and that it need not

more particularly set out the false statement by which the Judge was induced to make the order, nor shew that the facts were false within the defendant's knowledge, or that he had not reasonable or probable cause for believing them true.

1860.

ROSS

v.

NORMAN.

the Queen commanded the said sheriff &c. (setting out the mandatory part of the writ, and stating that it was indorsed for bail for 15*l.* 18*s.* 7*d.*); and the said writ being so indorsed for bail, the now defendant afterwards, and before the return thereof, to wit, on &c., contriving and intending as aforesaid, falsely and maliciously, and without having any reasonable or probable cause of action whatsoever against the now plaintiff, to the amount for which the now defendant caused the now plaintiff to be arrested, as hereinafter mentioned, caused the now plaintiff to be arrested by his body, under and by virtue of the said writ, and to be thereupon kept and detained in custody for a long time, to wit, for the space of six hours then next following, and until the now plaintiff, so being in custody as aforesaid, in order to obtain his liberation, afterwards, to wit, on &c., deposited with the said sheriff the said sum so indorsed on the said writ as aforesaid, and also the further sum of 10*l.* for costs, according to law, and which said last-mentioned two sums of money were afterwards in due manner, according to law, paid into the said Court in lieu of bail. Whereas in truth and in fact, the now defendant, at the time of obtaining the Judge's order for the said arrest, and suing forth the said writ, and of the arrest and imprisonment, had not any reasonable or probable cause of action against the now plaintiff, to the amount of the said sum of money for which the now defendant so maliciously caused the now plaintiff to be arrested as aforesaid, and whereby and for which the now plaintiff, by the law of this realm and by the practice of the said Court, could or ought to have been arrested or holden to bail as aforesaid. And the now plaintiff further saith, that the now defendant did not prosecute his said suit against the now plaintiff, nor did he declare therein against him, but that he the now defendant permitted the said suit to be discontinued for want of prosecution thereof; whereupon and whereby, and according to the practice of the said Court, the

said suit became and was ended and determined. By means whereof &c.

Special demurrer, and joinder therein.

1850.
 ROSS
 v.
 NORMAN.

Needham, in support of the demurrer.—The declaration is bad on three grounds. First, It does not set out the false statement by which the Judge was induced to make the order. Secondly, It does not shew that the affidavit used, or the circumstances relied on to obtain the order, were wilfully false within the defendant's knowledge, or that the defendant had not reasonable ground for believing them true. Thirdly, There is no averment of the want of reasonable and probable cause. In *Daniels v. Fielding*(a), the Court in giving judgment said, "It is essential under the present statute that the plaintiff, in an action for a malicious arrest, should allege falsehood or fraud in obtaining the original order. The action is in its character similar to an action for a malicious prosecution on a criminal charge, and the declaration ought therefore, in analogy to the course of pleading in such actions, to state what the false charge or statement was by which the Judge has been misled." [*Alderson*, B.—It is averred that there was no reasonable or probable cause of action.] It ought to have been averred, that the defendant had no reasonable or probable ground for *believing* that he had a cause of action, and that would be in issue under the plea of not guilty. [*Pollock*, C. B.—When the facts are proved, reasonable and probable cause is a question of law: *Panton v. Williams*(b).] Unless the defendant knew that the facts stated in the affidavit were false, the ground of this action fails. The averment, that he acted maliciously, is insufficient: *Roret v. Lewis*(c). Besides, it is not stated that the affidavit was made by the plaintiff, but only that it was "shewn and used." It is consistent with every allegation, that the de-

(a) 16 M. & W. 200.

(b) 2 Q. B. 169.

(c) 5 D. & L. 371.

1850.

Ross

v.

NORMAN.

fendant may have made the application to the Judge bona fide, but was mistaken as to the amount really due.

The Court then called on

Hugh Hill to support the declaration.—The declaration is framed in accordance with the precedents since the alteration of the law by the 1 & 2 Vict. c. 110: 2 Chit. Plead. 437, 7th edit. It in substance alleges, that the defendant, without reasonable or probable cause, maliciously procured from the Judge an order, by means of a false affidavit that a debt was due to him. The plea of not guilty puts in issue all that it is necessary to prove in order to sustain the action, namely, want of reasonable and probable cause, and malice: *Mummery v. Paul* (a). Here, as required in *Daniels v. Fielding*, it is stated what the false charge was by which the Judge was misled.

Needham in reply.—There is no part of the declaration which shews that the defendant knew that the affidavit was false. If it is meant only that the affidavit was false in fact, that affords no ground of action. It might be that the affidavit was untrue in some trifling particular, but that the defendant, at the time he made it, believed it to be true. In *De Medina v. Grove* (b), it was held, that no action would lie against an execution creditor or his attorney for issuing a fi. fa. indorsed to levy the whole sum recovered by a judgment, which, to the knowledge of both, has been partly satisfied by payment, unless malice and want of probable cause were alleged in the declaration and proved. Lord Denman, in delivering the judgment of the Court, there said, "If malice and want of reasonable and probable cause had been alleged, they would have formed the gist of the action, and the part payment would only have been a circumstance, which alone would not have entitled the plain-

(a) 1 C. B. 316.

(b) 10 Q. B. 152.

tiff to maintain the action." In *Roret v. Lewis* it was clear from the facts that there was no ground for the arrest, yet the declaration was held bad for not alleging a want of reasonable and probable cause.

1850.
 }
 Ross
 v.
 NORMAN.

THE COURT having intimated their opinion that the declaration was good,

Needham prayed leave to withdraw the demurrer and plead over, which was granted on terms.

Amendment accordingly.

In the Matter of the APOTHECARIES COMPANY v. BURT.

May 27.

THIS was a rule calling on the Judge of the County Court of Cambridgeshire, and the plaintiffs, to shew cause why a writ of prohibition should not issue to prohibit the said Court from further proceeding in this plaint.

The summons in the plaint required the defendant "to appear at a county court, to be holden at" &c., "to answer the plaintiffs in an action on contract for illegally practising as an apothecary;" and the "debt or claim" was stated to be 20*l*.

The particulars were as follows:—"This is an action brought to recover the sum of 20*l*., for that, after the 1st day of August, 1815, mentioned in a certain Act of Parliament passed in the fifty-fifth year of the reign of his late Majesty King George the Third, intituled, 'An Act for better regulating the practice of apothecaries throughout

By a plaint in a county court, the defendant was summoned for a debt of 20*l*., "for illegally practising as an apothecary." The particulars stated, that the action was brought to recover 20*l*., for that, after the 55 Geo. 3, c. 194, the defendant on divers days acted as an apothecary, without a certificate, at four places named, by attending and supplying medicine to four persons mentioned, whereby the defendant had forfeited the sum of 20*l*.

By the 55 Geo. 3, c. 194, s. 20, any person who shall practise as an apothecary without a certificate, shall forfeit "for every such offence" 20*l*.:—*Held*, on motion for a prohibition, that, whether the facts stated in the particulars amounted to four offences, or one only, the sum recoverable was limited by the summons and particulars to 20*l*., and therefore the county court had jurisdiction.

1850.
 In re
 APOTHECARIES
 Co.
 v.
 BURT.

England and Wales,' and before the commencement of this suit, to wit, on the 17th of November, 1849, and on divers other days and times, the defendant (he the defendant not being a person who, on the said 1st of August, 1815, or at any time theretofore, was actually practising as an apothecary) did act and practise as an apothecary in England, and within the jurisdiction of this Court, that is to say, in Upwell, in the Isle of Ely and county of Cambridge; Upwell, in the county of Norfolk; Outwell, in the Isle of Ely and county of Cambridge, and Outwell, in the county of Norfolk; by then and there, as such apothecary, attending and advising and furnishing and supplying medicines to and for the use of certain persons, to wit, one George Swan, one Caroline Palmer, one Eliza Andrews, and one William Ranson, without having obtained such certificate as by the said Act is directed, contrary to the form of the statute in such case made and provided; whereby, and by force of the same statute, the defendant forfeited for his said offence the sum of 20*l*. The sum of 20*l*. so forfeited is the sum which this action is brought to recover."

The ground of the present application was, that it appeared by the particulars, that the plaintiffs sought to recover, or might recover, four distinct penalties of 20*l* each, and consequently the county court had no jurisdiction.

Martin and F. Robinson shewed cause.—The plaint was issued for penalties under the Apothecaries Act, 55 Geo. 3, c. 194, the 20th section of which enacts, "That, if any person (except such as are then actually practising as such) shall, after the 1st of August, 1815, act or practise as an apothecary in any part of England or Wales, without having obtained such certificate as aforesaid, every person so offending shall for every such offence forfeit and pay the sum of 20*l*." By the 26th section, all penalties and forfeitures exceeding five pounds shall be recovered "in any

of his Majesty's courts of record in England or Wales." And by the 58th section of the County Court Act, 9 & 10 Vict. c. 95, "all pleas of personal actions, where the debt or damage claimed is not more than 20*l*., whether on balance of account or otherwise, may be holden in the county court." So that a penalty of this kind may form the subject of a plaint in the county court. Then it is obvious, from the summons and particulars, that the plaintiffs are seeking to recover one penalty only. It is true that the particulars mention four instances of practising; but that cannot affect the jurisdiction of the Court. The particulars are not delivered under any statute; they mean no more than that the defendant actually practised as an apothecary by attending the persons mentioned. Treating them as a declaration or count, all that can be said is, that they are open to objection on the ground of duplicity. When one case of attendance had been proved, it would be the duty of the Judge of the county court to prevent the plaintiffs from proceeding with the others; or if they proved four offences, they could only recover 20*l*., and might abandon the excess under the provisions of the 63rd section. It would seem, however, from the case of the *Apothecaries Company v. Bentley* (a), that an unqualified person only incurs one penalty, though he attends several patients. In *Rex v. Lovet* (b), which was an information under the game laws for using a dog and also a gun on the same day, it was held, that the defendant could only be convicted in one penalty. So, a person can commit but one offence on the same day, by exercising his ordinary calling on a Sunday, contrary to the 29 Car. 2, c. 7: *Creeps v. Durden* (c).

Naylor, in support of the rule.—The particulars state that the defendant attended four different persons at dif-

1850.
In re
 APOTHECARIES
 Co.
 v.
 BURT.

(a) 1 C. & P. 538; *S. C.*, R. & M. 159. (b) 7 T. R. 152.
 (c) Cowp. 640.

1850.
In re
 APOTHECARIES
 Co.
v.
 BURT.

ferent times and places; and, by the 55 Geo. 3, c. 194, s. 20, he is liable, for "every such offence," to forfeit 20*l*. Should the Judge of the county court, on evidence of the several acts of practice, decide that the plaintiffs were entitled to recover one penalty, they might afterwards issue another plaint, omitting the name of one of the persons attended, and so on with respect to the other two. If the plaintiffs intended to abandon the excess above 20*l*., it should have been so stated in the particulars. In *Vines v. Arnold* (a) it was held, that where the debt due from the defendant to the plaintiff was above 20*l*., the levying a plaint in the county court for less than that amount was not an abandonment of the excess. But in this case the plaintiffs could not abandon the excess; for though the action must be brought in the name of the Company, yet the 25th section directs that one half of the penalty shall be given to the informer; so that, at most, they could abandon their own portion only. [*Alderson, B.*—Is not the construction of the particulars this: I go for one or other of the four penalties, amounting to 20*l*.?] In *re Ackroyd* (b) shews that the cause of action may be made up of several contracts.

POLLOCK, C. B.—The rule must be discharged. I do not see any ground for this Court prohibiting the county court from hearing and determining the case. The claim is limited to 20*l*., and more cannot be recovered. The statement of the claim is indeed ambiguous, and may give rise to a question which has been urged to a certain extent, but upon which it is unnecessary to pronounce an opinion; namely, whether a number of acts done by the defendant at various times and places may be made the subject of more than one penalty. We need not, however, enter upon that inquiry. The county court has jurisdiction whenever the

(a) 19 L. J. 98.

(b) 1 Exch. 479.

claim does not exceed 20*l*., or the plaintiff is willing to abandon all beyond it.

1850.
In re
 APOTHECARIES
 Co.
v.
 BURR.

ALDERSON, B.—I do not see that the plaintiffs claim to recover, or say that they have cause of action for, more than 20*l*.; and it is only where the cause of action exceeds 20*l*. that a plaintiff is called upon to abandon the excess. The particulars may be ambiguous; but that is a matter for the Judge of the county court, who would do well to make the plaintiffs elect upon which of the four cases they mean to proceed, and use the others as evidence.

ROLFE, B.—I am of the same opinion, and on this short ground: that this is a plaint for a personal demand not exceeding 20*l*.; and that may be brought in the county court. All that is relied on is, that the plaintiffs in their particulars state how they go for the 20*l*., and in so doing state something from which we see that they might, perhaps, have gone for more. What the facts are as to the attendance we do not know; it may be that the plaintiffs have separate causes of action, but that it is not necessary to decide. They say, “ We go for a penalty of 20*l*. under the Apothecaries Act, and we mean to prove the offence by shewing that the defendant attended A., B., C., and D.”

PLATT, B.—Before a prohibition is granted, the Court ought to be sure that there is a want of jurisdiction. It is true that the particulars render it possible that the plaintiffs may be going for more than 20*l*.; at the same time it may be that they are seeking to recover the penalty in respect of one act only, and that the others are merely part of the one practising, and intended to be used as evidence to shew what the nature of it was.

Rule discharged.

1850.

May 31.

BRYAN v. CHILD and FARMER.

The 137th section of the 12 & 13 Vict. c. 106, which declares that a Judge's order, made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, shall be "null and void to all intents and purposes whatever," does not void such order, &c. as against the trader himself, but only as against his assignees if he afterwards become bankrupt.

TRESPASS for breaking and entering the plaintiff's dwelling-house, and seizing and taking his goods.

Plea, that the defendant Farmer recovered against the plaintiff in the Court of Common Pleas a certain debt of 146*l.* 19*s.* and 2*l.* 16*s.* damages and costs; whereupon he, and the defendant Child as his attorney, sued out a writ of fieri facias, by virtue of which the sheriff, in order to levy the said sums, seized and took in execution the goods and chattels in the declaration mentioned.—
Verification.

Replication, that before and at the time of the commencing and prosecuting of the said action &c., and after the passing of the Bankrupt Law Consolidation Act, 1849, the plaintiff was and from thence hitherto hath been and still is a dealer and chapman and a trader, to wit, a baker, within and subject to the laws then and still in force concerning bankrupts; that, after the commencement of the said action, a Judge's order was made by consent, that, on payment of debt and costs as between attorney and client, all further proceedings should be stayed, and, in default, judgment should be signed. That judgment was signed in pursuance of the said order, and the fieri facias mentioned in the plea issued thereon; and that no copy of the Judge's order, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the now plaintiff, was filed with the officer acting as clerk of the doquets and judgments in the Court of Queen's Bench, at any time within twenty-one days next after the making of the said order, in like manner as a warrant of attorney in any personal action, and a cognovit actionem given by any defendant in any personal action, or copies thereof or affidavits of the execution thereof respectively might or could be filed with the said

clerk within twenty-one days after such warrant of attorney or cognovit actionem should have been executed, or at any other time whatever, as by the statute in such case is required; whereby and by reason of the premises, the said Judge's order, judgment, and execution are null and void to all intents and purposes whatever.

General demurrer, and joinder therein.

Martin, in support of the demurrer.—The question turns upon the construction of the 137th section (a) of the Bank-

1850.
BRYAN
v.
CHILD.

(a) Enacts, "That every Judge's order made by consent given after the commencement of this Act, by any such trader defendant in any personal action, and whereby the plaintiff in such action shall be authorised forthwith after the making of such order, or at any future time, to sign or enter up judgment, or to issue or take out execution in such action, and whether such order shall be made subject to any defeasance or condition or not, in case the action in which such order shall be made shall be in the Court of Queen's Bench, or in case the action wherein the same is made shall be in any other court, a true copy of such order shall, together with an affidavit of the time of such consent being given, and a description of the residence and occupation of the defendant, be filed with the officer acting as clerk of the doquets and judgments in the said Court of Queen's Bench within twenty-one days after the making of such order, in like manner as a warrant of attorney in any personal action and a cognovit actionem given by any de-

fendant in any personal action, or copies thereof and affidavits of the execution thereof respectively may be filed with the said clerk within the space of twenty-one days after such warrant of attorney or cognovit actionem shall have been executed, otherwise such Judge's order, and any judgment signed or entered up thereon, and any execution issued or taken out on such judgment, shall be null and void to all intents and purposes whatever; and the provisions respectively contained in the said Act passed in the third year of the reign of his late Majesty King George the Fourth, intituled, 'An Act for preventing frauds upon creditors by secret warrants of attorney to confess judgment,' and in an Act passed in the Parliament holden in the sixth and seventh years of the reign of her Majesty, intituled 'An Act to enlarge the provisions of an Act for preventing frauds upon creditors by secret warrants of attorney to confess judgment,' for liberty to file warrants of attorney and cognovits actionem, or copies thereof, with the clerk of

1850.

BRYAN

v.

CHILD.

rupt Law Consolidation Act, 12 & 13 Vict. c. 106. In order, however, to ascertain its meaning, it is necessary to advert to the prior state of the law. The 3 Geo. 4, c. 39, "for preventing frauds upon creditors by secret warrants of attorney to confess judgment," after reciting, that "injustice is frequently done to creditors by secret warrants of attorney to confess judgment, for securing the payment of money, whereby persons in a state of insolvency are enabled to keep up the appearance of being in good circumstances, and the persons holding such warrants of attorney have the power of taking the property of such insolvents in execution at any time, to the exclusion of the rest of the creditors, for remedy thereof" enacts, "that if the holder thereof shall think fit, every warrant of attorney to confess judgment in any personal action, or a true copy thereof, and of the attestation thereof, and the defeasance and indorsements thereon, in case such warrant of attorney shall be given to confess judgment in his Majesty's Court of King's Bench at Westminster, or such true copy thereof as aforesaid, in case such warrant of attorney shall be given to confess judgment in any other court, shall within twenty-one days after the execution of such warrant of attorney be filed together with an affidavit of the time of execution thereof with the clerk of the doquets and judgments in the Court of King's Bench." The 2nd section enacts, "that if at any time after the expiration of twenty-one days next after the execution of such warrant of attorney, a commission of bankrupt shall be issued against the person who shall have given such warrant of attorney, under which he shall

the doquets and judgments, and for the said clerk to make certain entries and search in relation thereto, and for entering satisfaction thereon, and for fees for search and filing and taking office

copies, shall extend and be applicable to every such Judge's order, in like manner as to warrants of attorney and cognovits actionem mentioned in the said Acts."

1850.

BRYAN
v.
CHILD.

be duly found and declared a bankrupt, then and in such case, unless such warrant of attorney or a copy thereof shall have been filed as aforesaid within the said space of twenty-one days from the execution thereof, or unless judgment shall have been signed or execution issued on such warrant of attorney within the same period, such warrant of attorney, and the judgment and execution thereon, shall be deemed fraudulent and void against the assignees under the commission," &c. The 3rd section places cognovits on the same footing. The 4th section enacts, that, "if such warrant of attorney or cognovit shall be given subject to any defeasance or condition, such defeasance or condition shall be written on the same paper or parchment on which such warrant of attorney or cognovit actionem shall be written, before the time when the same or a copy thereof respectively shall be filed, otherwise such warrant of attorney or cognovit actionem shall be null and void to all intents and purposes." Next followed the 6 & 7 Vict. c. 66, its only object being to require the officer of the Court of Queen's Bench to keep a book for public search. Then comes the Act in question, 12 & 13 Vict. c. 106, which from the 133rd to the 138th section contains a code of law "with respect to transactions with the bankrupt, and executions against his property up to the time of the bankruptcy or within a limited period previously thereto." The 133rd section relates to payments by, and the 134th to purchases from, any bankrupt; the 135th and 136th have reference to warrants of attorney and cognovits, and the 137th to Judges' orders. Looking at all those enactments in connection with the preamble, it is obvious that the 137th section of the 12 & 13 Vict. c. 106, applies only where the property of a bankrupt is distributable, and does not enable a trader himself to defeat his own act of consent to judgment.

The Court called on

1850.

BRYAN
v.
CHILD.

Gray, contra.—Some effect must be given to the words “null and void to all intents and purposes whatever,” in the 137th section of the 12 & 13 Vict. c. 106, which for the first time required Judges’ orders to be filed. That section is framed upon the 3 Geo. 4, c. 39, s. 2, which declares that warrants of attorney not filed as thereby required shall be “void against the assignees.” The alteration of language in the subsequent statutes shews that the legislature intended a different result. The 137th section uses the words “any such trader,” which means “any person liable as a trader to become bankrupt.” That such is their meaning appears by the 65th and subsequent sections up to the 86th, in which the words “such trader” are used in that sense. In the 90th and 93rd sections the words are “any traders,” and in the 99th and 100th “any persons.” The 104th and 126th sections relate to persons who have been adjudicated bankrupts. [*Alderson, B.*—The 137th section of the 12 & 13 Vict. c. 106, in express terms extends the provisions of the 3 Geo. 4, c. 39, to Judges’ orders.] That has reference only to the machinery for carrying out the purposes of the 137th section. The 136th section re-enacts in terms the provisions of the 2nd section of the 3 Geo. 4, c. 39, with respect to warrants of attorney, except that, instead of declaring that such warrants not filed within the time limited shall be void “as against the assignees,” it declares that they shall be void to “all intents and purposes.” If, therefore, they are still only void as against assignees, the re-enactment is useless, for that was already provided for. [*Pollock, C. B.*—The 13 Eliz. c. 10, s. 3, declares, that ecclesiastical leases not authorised by that Act shall “be utterly void and of none effect, to all intents, constructions, and purposes, any law, usages, and custom to the contrary anywise notwithstanding;” and yet it has been held, that they are not void as against the persons who make them.] The object in requiring these orders to be filed was, that

notice should be given whenever a trader consented to judgment. [*Pollock*, C. B.—The preamble to this part of the statute is, “with respect to transactions with the bankrupt and executions against his property up to the time of the bankruptcy, or within a limited time previous thereto;” and that must be read as embodied in the 137th section.] That preamble relates only to the sections under division 20, viz. the 133rd and 134th; the 136th and 137th commence with the words “Be it enacted,” thus shewing them to be independent enactments. The 3 Geo. 4, c. 39, has been held to apply even where the petitioning creditor’s debt accrued after the twenty-one days: *Everett v. Wills* (a). [*Alderson*, B.—Unless there is a distinction between Judges’ orders and warrants of attorney, your construction of the statute cannot be correct; for the 136th section declares that warrants of attorney, not filed as thereby required, shall be deemed *fraudulent* as well as void; but how can they be fraudulent as against the trader himself? It must mean as against his creditors.]

1850.
BRYAN
v.
CHILD.

Martin was not called upon to reply.

POLLOCK, C. B.—The question is, whether, under the 12 & 13 Vict. c. 106, s. 137, when a trader has consented to a Judge’s order to enter up judgment, and judgment has been entered up, and execution issued thereon, but the order is not filed in pursuance of that section, the trader is at liberty, without reference to any proceedings in bankruptcy, to turn round and say that the judgment and execution is void, and that his creditor is a trespasser. The difficulty in coming to such a conclusion is not in any view inconsiderable, and, moreover, is increased by the 136th section, which, as pointed out by my Brother *Alderson*, enacts, that all warrants of attorney and cognovits not

(a) 2 M. & G. 269.

1850.

BRYAN
v.
CHILD.

filed as thereby required shall be deemed *fraudulent*, as well as null and void. In the present case, to treat the document as fraudulent against the party himself, who has signed it with full knowledge of its effect,—a document too by which he does a mere act of justice by allowing his creditor to issue execution, and that without being himself put to the costs of a suit,—would be so absurd, that, unless we have the positive expression of the legislature that such was meant to be the case, it is impossible for us to assume any such intention. That, however, is the proposition contended for on the one side. On the other, the question is, whether the 137th section may not be construed differently, by reference to the mode recently introduced in statutes, namely, by having certain clauses connected by a sort of preamble to each separate class of clauses, which preamble may really operate as part of the statute. The question then is, whether the introductory preamble to that set of clauses, beginning with the 133rd section, and terminating with the 138th, is to be read as incorporated with each of those sections. In my opinion it must, in order to ascertain what the meaning of the legislature was; and so reading the statute, there is no difficulty in construing it. The introductory expression of the legislative intention or preamble is this: “And with respect to transactions *with the bankrupt*, and executions against his property up to the time of the bankruptcy or within a limited period previously thereto, be it enacted.” Then the 133rd section up to the 138th are all included under that general heading, so that we must read the 137th section, looking back to this preamble, and reading it in that way it would stand thus: “Be it enacted, that every Judge’s order made by consent given after the commencement of this Act, by any *such trader*” &c.,—not “by any trader,” words which surely must mean a trader who shall afterwards become bankrupt, and cannot be construed to apply to any trader, whether he shall become bankrupt or not.

In the course of the argument, it was intimated by the Court, that, even without the preamble, the words "null and void to all intents and purposes" would not necessarily make this document null and void as against the trader himself; and the case of ecclesiastical leases was referred to. I do not found my judgment in any degree on the decisions with respect to ecclesiastical leases, but purely upon the construction of this statute taken altogether. I am of opinion that we must read the 137th section with the preamble, and so reading it, this Judge's order, with the judgment and execution on it, are not null and void to all intents and purposes, the party who consented to that order not having become bankrupt, nor, so far as we know, liable to the bankrupt law.

1880.

BRYAN
v.
CHILD.

ALDERSON, B.—I am of the same opinion. On looking to the words of the statute, there appears to me no necessity for arriving at the grievous absurdity of allowing a person to set aside his own deliberate act. The contest here is, that a person, who may be a perfectly solvent trader, may set aside the order of a Judge made by consent, after judgment signed and execution issued, simply because that order has not been filed as required by the statute. That would be a grievous absurdity. No doubt, if the Act compels us, we must come to that conclusion; but I do not think it does. The provision in question is found in that part of the Act which relates to proceedings with bankrupts alone, and must be read with the light thrown on it by the preamble, it being one of the clauses within the ambit of that preamble; and so reading it, it has reference only to such trader being bankrupt, or subsequently becoming bankrupt.

ROLFE, B.—I am also of opinion that this section must be read in connection with the preamble referred to; and

1850.

BRYAN
v.
CHILD.

I think that the construction of the statute also requires it to be read in connection with the preamble to the 125th section, "with respect to the power of the Court over certain descriptions of property." That the section must be read in connection with the former preamble is plain from merely following the grammar; for after the words "it is enacted," comes the 133rd section, and then the 134th begins without the words "be it enacted," and must therefore be connected with what went before, otherwise there is no sense. It is true that the same observation does not apply to the 136th and 137th sections, for they do begin, "be it enacted;" but that is a mere difference of style; and these sections being in *pari materia* with the former, must be read in the same way. But independently of that, I should be prepared to say, on authority as well as principle, looking at the object of the Act as deduced from the statute itself, that we must confine the 137th section as operating in favour of creditors only, and not construe it as affecting the rights of persons claiming under traders who have given such instruments. My Lord has adverted to the statutes of Elizabeth respecting ecclesiastical leases. Nothing can be stronger than the words used in those statutes, which declare that leases not authorised by them "shall be utterly void and of none effect, to all intents, constructions, and purposes, any law, usage, or custom to the contrary notwithstanding." Still the Courts early said, that such leases were not meant to be null and void as against the lessors; that the statute was made for the benefit of their successors; and that the leases were only void as against them. Now the 3 Geo. 4, c. 39, upon which the 137th section of the 12 & 13 Vict. c. 106, is founded, has given rise to discussions of a like nature with the present. [His Lordship read the title and preamble, and the 1st, 2nd, 3rd, and 4th sections of the 3 Geo. 4, c. 39.] The first case after that statute was *Morris v. Mel-*

1850.

BRYAN

v.

CHILD.

lin (a), in which the question was, whether the assignee of an *insolvent* could insist on setting aside as void a judgment founded on a warrant of attorney subject to a defeasance, not written on the same paper as the instrument itself. A majority of the Court of King's Bench, consisting of Lord *Tenterden*, C. J., *Bayley*, J., and *Littledale*, J., held, that the statute did not affect such a warrant of attorney as against the assignees of an insolvent, and that the 4th section must be read in conjunction with the 2nd, and construed to apply only to assignees of a bankrupt. *Holroyd*, J., dissented, and, I must own, with great appearance of justice, because in that statute there is something which does not occur in this, namely, a marked distinction in the wording of the sections. There, if the document was not filed within a certain time, it was declared to be void "as against assignees," but if the defeasance was not on it before it was filed, it was declared to be void "to all intents and purposes," so that it was somewhat strange to say, that "to all intents and purposes," only meant against assignees of bankrupts; still the majority of the Court so held. Then came the case of *Bennett v. Daniel (b)*, where the question arose, whether a warrant of attorney, on which there was no proper defeasance, could be set aside at the instance of the party who had executed it. The majority of the Court held that it could not. *Parks*, J., dissented, adopting the view taken by *Holroyd* J., in the previous case, but expressly saying, that if he had found in the statute that it was meant only for the protection of the assignees of bankrupts, he should have concurred. In the subsequent case of *Davis v. Eyton (c)*, *Tindal*, C. J., treated the question as settled. Therefore, notwithstanding there are in this statute the very strong words "null and void to all intents and purposes," yet, even if there had been no preamble, I should have been

(a) 6 B. & C. 466.

(b) 10 B. & C. 509.

(c) 7 Bing. 154.

1850.

BRYAN
v.
CHILD.

disposed to adopt the construction consistent with good sense and the previous authorities; for, although *Holroyd J.*, and *Parke, J.*, differed as to the application of the principle, neither disputed the principle itself.

PLATT, B.—The object of the bankrupt law is to protect creditors, not to enable traders to repudiate their own deliberate acts. Reading the 137th section as it ought to be read, in connection with the preamble, it is evident that it relates only to such traders as shall become bankrupt. But even if the preamble is not to be considered as incorporated with the section, I should be disposed to take the same view as my Brother *Rolfe*, and to hold, that, upon principle and authority, the operation of the 137th section is limited to assignees and creditors under a bankruptcy.

Judgment for the defendant.

May 31.

BOWDITCH v. BALCHIN.

A police constable of the city of London has no power, under the 2 & 3 Vict. c. xciv, to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanor.

TRESPASS for assaulting the plaintiff, and conveying him to a police-station, and there detaining him without reasonable or probable cause.

Plea, as to assaulting the plaintiff, and conveying him to the said police-station, that, before the time when &c., the defendant was a constable of the police of the city of London, appointed under a certain Act of Parliament made and passed &c. (2 & 3 Vict. c. xciv); and that, at the time when &c., he was acting as such constable within the said city; and that just before the committing of the supposed trespasses, and whilst he was acting as such constable within the said city, to wit, &c., one John Miller, in the presence and hearing of the plaintiff, stated and represented to the

1850.
 BOWDITCH
 v.
 BALCHIN.

defendant, then acting as such constable of the police force as aforesaid, that the plaintiff had committed a certain offence, to wit, wilful and corrupt perjury, by wilfully and corruptly making a false affidavit in a judicial proceeding before the Hon. Sir William Wightman, Knight, one of the justices of the Court of our Lady the Queen, before the Queen herself, and that the said John Miller then and there charged the plaintiff with the commission of the said offence, and then and there required the defendant Thomas Balchin to take the plaintiff into custody upon the said charge; wherefore, and because the plaintiff, on being asked by the defendant on the said occasion if his the plaintiff's name was Bowditch, replied that it was not, and that he should not tell what his name was, he the defendant then had good cause to suspect, and did then suspect, the plaintiff of having committed the said offence, and, as such constable of the police, did then, within the said city, take the plaintiff into custody; and because there was no justice of the peace for the said city then sitting, before whom the plaintiff could be taken upon the said charge, the defendant caused the plaintiff to go in and along divers public streets and highways in the said city to a certain police-station in the said city, such station being the station-house in and for the district or division of the said city within which the plaintiff was so taken into custody as aforesaid, and did then deliver him to one J. Fosberry, being the constable of the said police force in charge of the station, doing no unnecessary damage, &c., quæ sunt eadem.—Verification.

Demurrer, and joinder therein (a).

J Brown, in support of the demurrer.—The substantial question raised by this demurrer is, whether a police con-

(a) The plaintiff demurred specially on several grounds; but as the Court held the plea bad in substance, it is unnecessary to advert to them.

1850.
 BOWDITCH
 v.
 BALCHIN.

stable of the city of London can take a person into custody on suspicion of perjury. That depends upon the 2 & 3 Vict. c. xciv, "for regulating the police in the city of London." The 9th section confers on police constables appointed under that Act all the powers which any constables possess by the common or statute law. At common law a constable has no power to arrest a person without warrant, on suspicion of having committed a misdemeanor. The 8th section of the 2 & 3 Vict. c. xciv, upon which this plea is framed, empowers "any man belonging to the said police force to take into custody, without warrant, all loose, idle, and disorderly persons, whom he shall find disturbing the public peace, or whom he shall have good cause to suspect of having committed or intending to commit any felony, misdemeanor, or breach of the peace, and all persons whom he shall find between sunset and the hour of eight in the forenoon lying in any highway, yard, or other place, or loitering therein, and not giving a satisfactory account of themselves." The words "loose, idle, and disorderly persons," override and control the words "whom he shall have good cause to suspect of having committed &c. any misdemeanor." But the plea contains no averment that the plaintiff was a loose, idle, or disorderly person. The 35th section enumerates the offences for which a police constable may take a person into custody without warrant.

The Court then called on

Hugh Hill to support the plea.—Although, according to strict grammatical construction, the words, "loose, idle, and disorderly persons," might override the subsequent part of the clause, yet the plain intention of the legislature was, that whenever a constable had good cause to suspect any person of having committed, or intending to commit, any felony, misdemeanor, or breach of the peace, he should be justified in taking such person into custody without warrant. [*Alderson*, B.—If the legislature had so intended,

they would have inserted the words, "and all other persons." *Pollock*, C. B.—Suppose a person refused to serve some public office, or had committed any breach of duty imposed by statute, would a police constable be justified in taking him into custody without a warrant? In a case in which the liberty of the subject is concerned, we cannot go beyond the natural construction of the statute.]

1850.
BOWDITCH
v.
BALCHIN.

PER CURIAM (a).—There must be judgment for the plaintiff

Judgment for the plaintiff.

(a) *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

PENKIVIL v. CONNELL.

May 23.

OGLE had obtained a rule, calling on the plaintiff to shew cause why all further proceedings in this action should not be stayed, until the plaintiff should have made proof of his debt before the Master appointed to wind up the affairs of the Royal Bank of Australia.

It appeared from the defendant's affidavit, that the action was brought to recover 200*l.*, the amount of a promissory note made by the defendant, who was one of the directors, shareholders, and contributories of a joint-stock Company, established in 1840, in the city of London, called the Royal Bank of Australia. On the 4th of February, 1850, one of the shareholders and contributors presented a petition under the Joint-stock Companies Winding up Act,

The defendant, a director and shareholder in a Joint-stock Company, together with three others, made the following promissory note:—"We, the Directors of the Royal Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay to H. W., or bearer, on &c., the sum of &c., for

value received on account of the Company." Signed, "A. B., C. D., E. F., "Directors." The defendant having been sued thereon in his individual character:—*Held*, that the case did not fall within the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 46, s. 73, and that there was no ground for staying the action until the plaintiff should have proved his debt before the Master appointed to wind up the affairs of the Company.

1850.

BRYAN
v.
CHILD.

Gray, contra.—Some effect must be given to the words “null and void to all intents and purposes whatever,” in the 137th section of the 12 & 13 Vict. c. 106, which for the first time required Judges’ orders to be filed. That section is framed upon the 3 Geo. 4, c. 39, s. 2, which declares that warrants of attorney not filed as thereby required shall be “void against the assignees.” The alteration of language in the subsequent statutes shews that the legislature intended a different result. The 137th section uses the words “any such trader,” which means “any person liable as a trader to become bankrupt.” That such is their meaning appears by the 65th and subsequent sections up to the 86th, in which the words “such trader” are used in that sense. In the 90th and 93rd sections the words are “any traders,” and in the 99th and 100th “any persons.” The 104th and 126th sections relate to persons who have been adjudicated bankrupts. [*Al-derson, B.*—The 137th section of the 12 & 13 Vict. c. 106, in express terms extends the provisions of the 3 Geo. 4, c. 39, to Judges’ orders.] That has reference only to the machinery for carrying out the purposes of the 137th section. The 136th section re-enacts in terms the provisions of the 2nd section of the 3 Geo. 4, c. 39, with respect to warrants of attorney, except that, instead of declaring that such warrants not filed within the time limited shall be void “as against the assignees,” it declares that they shall be void to “all intents and purposes.” If, therefore, they are still only void as against assignees, the re-enactment is useless, for that was already provided for. [*Pollock, C. B.*—The 13 Eliz. c. 10, s. 3, declares, that ecclesiastical leases not authorised by that Act shall “be utterly void and of none effect, to all intents, constructions, and purposes, any law, usages, and custom to the contrary anywise notwithstanding;” and yet it has been held, that they are not void as against the persons who make them.] The object in requiring these orders to be filed was, that

1850.
BRYAN
v.
CHILD.

notice should be given whenever a trader consented to judgment. [*Pollock*, C. B.—The preamble to this part of the statute is, “with respect to transactions with the bankrupt and executions against his property up to the time of the bankruptcy, or within a limited time previous thereto;” and that must be read as embodied in the 137th section.] That preamble relates only to the sections under division 20, viz. the 133rd and 134th; the 136th and 137th commence with the words “Be it enacted,” thus shewing them to be independent enactments. The 3 Geo. 4, c. 39, has been held to apply even where the petitioning creditor’s debt accrued after the twenty-one days: *Everett v. Wills* (a). [*Alderson*, B.—Unless there is a distinction between Judges’ orders and warrants of attorney, your construction of the statute cannot be correct; for the 136th section declares that warrants of attorney, not filed as thereby required, shall be deemed *fraudulent* as well as void; but how can they be fraudulent as against the trader himself? It must mean as against his creditors.]

Martin was not called upon to reply.

POLLOCK, C. B.—The question is, whether, under the 12 & 13 Vict. c. 106, s. 137, when a trader has consented to a Judge’s order to enter up judgment, and judgment has been entered up, and execution issued thereon, but the order is not filed in pursuance of that section, the trader is at liberty, without reference to any proceedings in bankruptcy, to turn round and say that the judgment and execution is void, and that his creditor is a trespasser. The difficulty in coming to such a conclusion is not in any view inconsiderable, and, moreover, is increased by the 136th section, which, as pointed out by my Brother *Alderson*, enacts, that all warrants of attorney and cognovits not

(a) 2 M. & G. 269.

1850.
 PENKIVIL
 v.
 CONNELL.

11 & 12 Vict. c. 45, praying that it might be referred to one of the Masters of the Court of Chancery to wind up the affairs of the Company. On the 26th of March, 1850, the petition was heard before Vice-Chancellor *Knight Bruce*, who ordered that the Company should be dissolved and wound up under the provisions of that Act; and on the 25th of April, an official assignee was appointed. It was also stated, that the note was made by the defendant as one of the directors of the Bank, and that the proceeds were received and applied by the Bank for its own purposes; that defendant was advised that he was sued as a contributory of the Bank, and that, upon payment of the amount, he would be entitled to recover contribution from the other shareholders and contributories. The affidavit then stated, that *Alderson, B.*, upon a summons coming on to be heard before him, for staying proceedings in the terms of the above rule, stayed execution for a week, to give the defendant an opportunity of bringing the question before this Court.

The plaintiff's affidavit in answer set forth the promissory note, which was in these terms:—

"The Royal Bank, London.

"19th February, 1845.

"£200.

"We, the Directors of the Royal Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay G. H. Wray or bearer, on the 19th day of February, 1850, at the Union Bank of London, the sum of 200*l.* for value received, on account of the Company.

"T. W. SUTHERLAND,	}	Directors.
"JOHN CONNELL,		
"M. BOYD,		
"A. DUFF,		

The affidavit then stated a belief that the Company dis-

puted their liability, and alleged that the defendant and his co-directors had no power to issue the promissory note in question; and that the shareholders were not liable thereon. A similar application to the present had been made to *Oderidge, J.*, at Chambers, but he refused to make any order.

1850.
PENNIVIL
v.
CONNELL.

Sir *F. Thesiger* shewed cause.—The application is founded on the 73rd section of the Joint-stock Companies Winding up Act, 11 & 12 Vict. c. 45 (a). This, however, is not a case within that enactment, for there is a *several* liability on the note. The object of the statute was to prevent creditors from having recourse to one of many shareholders jointly liable. It has reference only to actions against the “official manager, or against the Company or any other person representing the same, or who is sued as a contributory thereof.” “Contributory” means a person who, being sued, is entitled to contribution from the other members jointly liable. In *Healey v. Story* (b), the defendants, directors of a Joint-stock Company, made their note, by which they jointly and severally promised to pay to E. H. or his order, and this Court there held, that the defendants were liable upon the note individually.

(a) Enacts, “That, after the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager, or against the Company or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or making such proof as he may be able, of his

debt or demand before the Master, as hereinafter mentioned; and it shall be lawful for any Judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master.”

(b) 3 Exch. 3.

1850.
PENKIVIL
v.
CONNELL.

Ogle, in support of the rule.—The Winding-up Act was intended to stop actions against contributories of a Joint-stock Company. By the 3rd section, the word “contributory” is defined as including “every member of a Company, and also every other person liable to contribute to the payment of any of the debts, liabilities, or losses thereof. The defendant is not the less a contributory because he is sued alone on the note. It was given in respect of a debt contracted for the Company; and though the judgment be against the defendant individually, he would have a right to contribution. The 76th section requires the official manager to make out a list of the members and other contributories of the Company; and by the 79th section, such list, when settled by the Master, is conclusive.

POLLOCK, C. B.—We are all clearly of opinion that the rule ought to be discharged. The defendant seeks this remedy as a contributory under the Act, and as having been sued as such; but if all the facts of this case had appeared to the Court at the time the rule was moved, no rule would have been granted. The defendant is sued individually in respect of a joint and several promissory note, of which it appears that he is the maker. The plaintiff has elected to sue the defendant in respect of his personal liability. The case is the same as if the defendant had been sued upon his promissory note made by him in his individual character, and having no connection whatever with the Company. All that the plaintiff would have to prove upon the trial would be the handwriting of the defendant; and therefore the plaintiff ought not to be dragged before a Master in Chancery to prove his claim, and to enter into an inquiry, where that simple fact is the only matter to be investigated. It would be a fraud upon some one if such a note were allowed to be proved against the funds of the Company. The note, as sued upon, has no connection

whatever with the Company. The rule ought, therefore, to be discharged, with costs.

1850.
 PENKIVIL
 v.
 CONNELL.

ALDERSON, B.—I am of the same opinion. The Court, no doubt, under particular circumstances, has power to stay actions brought against members of public Companies,—as, for instance, where a person is sued as a member of the provisional committee, after an official manager has been appointed to wind up the affairs of the Company. But, in the present case, the defendant is not sued for a debt due by him as a member of the Company, but for the recovery of a debt for which he is personally and individually responsible, and for which he would be equally so if no Company existed. He may have made this note for the accommodation of the Company.

ROLFE, B.—I am of the same opinion. The defendant is sued for his own separate debt, whereas it is contended that he is sued as if the debt were that of the Company. It may be that the creditor has refused to lend the money to the Company, except upon the terms of receiving the several promissory note of the defendant. That may have been the reason why this note is in the present form. There is not much weight to be attributed to the hardship under which the defendant is suggested to labour, for he may, if he pleases, use the ordinary means to have his name placed upon the list of contributories.

PLATT, B.—The only question in this case is, whether the defendant fills any of the characters mentioned in the Act of Parliament. It is clear that he does not, for he is sued in his individual capacity, upon his separate liability.

Rule discharged.

1850.

May 23.

SANGSTER v. KAY.

A clerk to the Privy Council is not a person who "carries on his business" at the office of the Privy Council, within the meaning of the 60th section of the County Courts Act, 9 & 10 Vict. c. 95.

THIS was a rule calling upon the plaintiff to shew cause why a suggestion should not be entered upon the roll to deprive him of costs, under the 129th section of the County Courts Act, 9 & 10 Vict. c. 95. It appeared that the plaintiff had brought his action in the superior court, and had recovered the sum of 9*l.* 2*s.* 6*d.* only, and the defendant had obtained the rule on the ground that the plaintiff ought to have brought his action in the Westminster County Court, as the defendant was a clerk to the Privy Council, the office of which was in Whitehall.

Martin shewed cause.—The main objection to this application is, that the defendant cannot be said to have carried on his business, at the time of the action brought, within the district of the County Court in which the defendant contends the action should have been brought, within the true meaning of the 60th section of the 9 & 10 Vict. c. 95. That section enacts, that the summons may issue "in any district in which the defendant or one of the defendants shall dwell or *carry on his business* at the time of the action brought." This precise point was decided in *Buckley v. Ham* (a), which turned upon the words of the London Small Debts Act, 10 & 11 Vict. c. lxxi. The language of that Act is identical with that of the present; and it was held in that case, that a clerk in the Admiralty who, as such, attends at an office within the city of London, is not a person who "carries on his business" within the meaning of the local Act. *Parke*, B., in delivering the judgment of the Court, said, "A similar question has been under the consideration of the Court of Queen's Bench with respect to the County Courts Act, 9 & 10 Vict. c. 95, and they have

(a) Ante, p. 43.

held that the deputy sealer of writs in the Court of Chancery is not a person who carries on his business in any definite locality. In like manner, it cannot be considered that a clerk who attends at an office in the city carries on some independent business there, so as to be within the meaning of the Act in question." The case to which the learned Judge refers is that of *Rolfe v. Learmouth* (a). These authorities cannot be distinguished from the present case.

1850.
 SANGSTER
 v.
 KAY.

Hawkins, in support of the rule.—"Business" is defined in Johnson's Dictionary to mean "employment," and the defendant may clearly be said to carry on his "employment" or business within the district of the Middlesex County Court, according to the meaning of this section of the Act. *Buckley v. Hann* is distinguishable from the present case; for there the affidavit merely stated that the defendant daily attended at the place in question.

POLLOCK, C. B.—I am of opinion that this rule ought to be discharged. The only substantial question in the case is, whether a person who is a clerk in the Privy Council Office is a person "carrying on his business" within the meaning of this Act of Parliament. I am of opinion that he is not. The term "business" may mean the employment or the occasional occupation of a person; but the term "carrying on business," within the meaning of this Act of Parliament, implies something more than mere service, from which the person may be discharged at a moment's notice. I therefore think that the defendant cannot be said to carry on business within the meaning of the Act.

ALDERSON, B.—I am of the same opinion. The defendant can neither be said to carry on any business nor to

(a) 19 L. J., Q. B., 10.

1850.
SANGSTER
v.
KAY.

carry on business at any fixed place. The affidavit is, therefore, not sufficient.

ROLFE, B.—I agree with the rest of the Court in thinking that this defendant did not carry on business within the meaning of the Act. The foreman at a haberdasher's shop could not be said to carry on business there, because he attends to the shop and does what he is employed to do by his master.

Rule discharged.

May 25.

MESSENGER v. CLARKE.

A husband and wife separated by agreement (not under seal), and at that time he agreed to allow her a certain sum weekly, for her support, which was paid, and she saved a certain portion of her allowance and invested it in stock, but a few days before her death she sold out the stock, and disposed of the proceeds by way of gift:—*Held*, that the husband was entitled to recover back the money so given, in an action for money lent, against the person who received it.

DEBT for money lent, and on an account stated.—The defendant pleaded never indebted, and upon that plea issue was joined. At the trial, before *Pollock*, C. B., at the London Sittings after last Easter Term, it appeared that the action was brought by the plaintiff against the brother of his deceased wife, to recover the sum of 74*l.* 15*s.*, under the following circumstances:—In 1840, the plaintiff and his wife agreed, but without any deed of separation, to live apart, and he was to allow her 10*s.* a week; but upon an application by letter for a further allowance, the plaintiff acceded to her request, and increased her allowance. The plaintiff and his wife never again lived together. Out of the allowance which had been so made to her, she saved some money, with which she purchased stock, and invested the amount in her maiden name. On the 6th of September, 1849, the plaintiff's wife, who was in a precarious state of health, proceeded to the Bank of England with the defendant, and, having sold out the stock, (according to the defendant's case,) handed over the proceeds to him as a gift. On the 8th of September, she died. The Lord Chief Baron directed the jury, that, under these circumstances, the plaintiff was entitled to re-

cover the money so paid to the defendant. A verdict having accordingly been found for the plaintiff,

1850.
 MESSRS
 v.
 CLARKE.

Montagu Chambers now moved for a new trial, on the ground of misdirection.—As the plaintiff and his wife lived apart, the husband gave her an implied authority to deal as she pleased with the savings which might arise out of her separate maintenance. The wife had a perfect control over the money which the plaintiff seeks to recover in this action, and therefore had the power of disposing of it by gift; and the jury ought so to have been directed in point of law. If this were not so, the husband might maintain an action against a vendee or pawnee for property which the wife had purchased with money advanced to her by the husband, and which property she had afterwards sold or pawned. The rule is thus laid down in *Roper's Treatise on Husband and Wife*, Vol 2, p. 305, 2nd edit:—"As the wife may dispose by will of savings from her separate estate limited to her sole use by a stranger, so also she may dispose of savings from her separate maintenance; but if she make no disposition, and her husband be the survivor, he will be entitled to them as her administrator, subject to her separate debts; and during the wife's life, her savings will not be liable to her husband's engagements, if the settlement were made for a valuable consideration." The same rule is to be found in 1 *Williams on Executors*, p. 639, and *Bac. Abr.*, "Baron and Feme," (D). The case of *Gage v. Lister* (a) is also in point. It was there held, that a wife who is parted from her husband, and has a separate allowance, may make a gift of her savings as if she were a feme sole, and that the person to whom such gift is made shall not be considered as a trustee for the husband. [*Alderson*, B.—That was, no doubt, an assign-

(a) 1 Bro. Parl. Cas., by Tomlins, p. 4.

1850.
 MESSENGER
 v.
 CLARKE.

ment for a valuable consideration.] In *Nurses v. Craig* (a), the husband and wife separated by deed, the husband covenanting to make her a separate allowance; but the husband having neglected to pay her the stipulated allowance, and the covenantee having supplied her with necessities, it was held that he might maintain an action against the husband for their price; and Sir *J. Mansfield*, C. J., there said, "The effect is to make the separate provision the separate property of the wife. She may mortgage it. If she save anything, and die, she may dispose of it by will, without the consent of her husband. This has long since been determined in equity." The rule is founded upon the implied authority given to her by the husband that she is to have an absolute and unlimited control over her savings. So in *Slanning v. Style* (b), it was held that, "if the husband voluntarily allows the wife for her separate use to make profit of all butter, eggs, &c., beyond what are used in the family, out of which she saves 100*l.*, which the husband borrows, and dies, the wife shall come in as a creditor for this sum." The Lord Chancellor there said, "It was the strongest proof of the husband's consent, that the wife should have a separate property in the money arising by these savings, in that he had applied to her, and prevailed with her to lend him this sum, in which case he did not lay claim to it as his own, but submitted to borrow it as her money." In *Gore v. Knight* (c), a woman who on her marriage had reserved to herself a power to dispose of her personal estate, and the rents and profits of her real estate, made her will, and devised to the plaintiff several securities for money, and her personal estate; and having, amongst other things, disposed of several mortgages, it was objected, that it did not appear that they were any part of the estate over which she had reserved control. The

(a) 2 N. R. 148.

(b) 3 P. Wms. 337.

(c) 2 Vern. 535.

Lord Keeper said, "It appears not that any other estate came afterwards to the lady, and therefore what she died possessed of is to be taken to be the separate estate, or the produce of it, unless the contrary had been made appear; and as she had a power over the principal, she consequently had it over the produce of it, for the sprout is to savour of the root, and to go the same way." In *Fettiplace v. Gorges* (a), the Lord Chancellor said, "The first case upon the subject is a very old one in Tothill: that, where a woman from her separate stock has saved a sum of money, she may dispose of it. It does not appear what the word "stock" means. I know there is a vast number of cases upon it; but I have always thought it settled, that, from the moment in which a woman takes personal property to her sole and separate use, from the same moment she has the sole and separate right to dispose of it. It is incident to dispose of the savings out of her personal estate. She certainly might enjoy it; and as to the produce, that is all merely personal property. If she makes no disposition, the husband proceeds as next of kin, not in consequence of the marital right. Upon the cases, I have always taken this ground,—that personal property, the moment it can be enjoyed, must be enjoyed with all its incidents." [*Alderson, B.*—At law, this property is the husband's, although perhaps in equity he may have made himself liable as her trustee. If there had been any evidence that the defendant had given a valuable consideration for this money, the matter would have stood upon a very different footing.] The wife might have disposed of these savings by will; and, having her husband's authority to dispose of her allowance as she might think fit, and having so disposed of it, the husband is not entitled to recover it back by action.

1850.
 MESSRS
 CLARK.

ALDERSON, B.—I am of opinion that there ought to be

(a) 1 Ves. jun. 46.

1850.
MESSINGER
v.
CLARK.

no rule. The cases cited are authorities to shew, that in equity, where the wife has a separate estate settled to her use, and she effects savings out of that separate estate, she has the same power and control over those savings, as she had over the separate estate itself. That principle holds good in Courts of equity, but has no application to the present case. "A separate maintenance," and "a maintenance upon separation," are distinct matters, and are not to be considered as synonymous. In the case of a maintenance on separation, the husband allows money to his wife, from whom he has separated, to the end that she may supply herself with necessaries through the medium of it. The very next passage in Mr. Roper's work to that which has been relied upon runs thus: "The intent of the provision made for the wife upon separation, being to enable her to procure necessaries, it follows that the application of it to those purposes, however it may be settled, is a legitimate appropriation of the property." The real truth is, that the only authority which the husband gave to the wife in the present case, upon their separation, with respect to the allowance made to her by him, was, that she should supply herself with necessaries out of it. If she chooses to save some of it, the money so saved becomes his and not hers. In the present case, therefore, the money so saved and appropriated was the husband's, as he gave her no authority so to save and appropriate it.

ROLFE, B.—I am of the same opinion. Mr. *Chambers* puts the case in this way—that when the husband gave his wife this weekly sum, he gave her implied authority to dispose of it in what manner she should think fit. I am much inclined to accede to that, and I agree, that when the husband gave his wife the 15s. a week, it was not in his power to recall it; but I do not shrink from the proposition, which has been put as a *reductio ad absurdum* on

the plaintiff's argument, that if she were to purchase a chattel out of her savings she would have no power to dispose of that chattel. She had done that here, for she had purchased stock; but it does not at all follow, that, because she might have had power to dispose of her savings, she had, as a consequence, also power to dispose of stock so purchased. All the cases which have been cited are cases in equity, and there is no doubt that a wife may dispose of her separate property. And this is so, although trustees may not have been appointed; for in such case, in a Court of equity, the husband may be looked upon as trustee for his wife, according to the well-known rule in those Courts, that a trust shall never fail for want of a trustee. The case of *Nurse v. Craig* has a very remote bearing upon this question. There the husband and wife were separated by deed, whereby the husband covenanted with the wife's sister to pay to the wife or her appointee 5s. a week during separation; and the husband having withheld the stipulated allowance, the question was, whether the wife's sister could sue the husband in indebitatus assumpsit, for necessities supplied to the wife by her sister during such period. The case was much argued, and the Court were not unanimous in opinion. Sir *James Mansfield*, C. J., in an able judgment, maintained that the husband, being liable on his covenant, was absolved in that form of action which had been brought against him. I cannot see what bearing that case has upon the present question. The short ground upon which I go is, that this stock was the husband's, and that the wife had no authority, express or implied, from him to dispose of this property by gift.

PLATT, B.—The authorities cited are cases in the Courts of equity, where the property in question was that of the husband in point of law, but where he was considered as trustee for his wife by the Courts of equity, which interfered to compel him to perform the trusts. It has been

1850.
 MESSINGERS
 &
 CLARK.

1850.
 MESSINGHER
 v.
 CLARKE.

no rule.
 equity
 use,
 she
 a'

EXCERPTS REPORT
 recommended by the learned counsel in the present case, that
 the stock in question was the property of the husband; but
 than he contended that the money by which that stock was
 purchased was the wife's, and that, under the authority
 he gave her to do what she pleased with it, she was at li-
 berty to give away any of her savings out of the money.
 But is that so? Can any such inference be drawn from the
 facts of the case? The husband gave her the allowance for
 her support, and for that only, and there is not a tittle of
 evidence that he gave her any authority to sell the stock,
 and to give away the proceeds. The stock, therefore, still
 remained his property, and it was money had and receiv-
 ed by the defendant to the use of the plaintiff.

POLLOCK, C. B.—I fully concur with the rest of the
 Court in thinking that there ought to be no rule. The
 question is, whether there was any evidence that the hus-
 band had given his wife authority to part with this stock.
 I think there was none. The property, therefore, was his,
 and he is entitled to recover it back in the present form of
 action.

ALDERSON, B., added:—We do not wish to be understood
 as entertaining any doubt that, if she had disposed of the
 money in payment of her debts, or had parted with it for
 a good and valuable consideration, under such circum-
 stances it could be recovered back.

Rule refused.

1850.

CRANSTON v. MARSHALL and Another.

May 24.

ASSUMPSIT.—The first count of the declaration stated, that heretofore, to wit, on &c., in consideration that the plaintiff, at the request of the defendants, then paid to the defendants a sum of money, to wit, 32*l.* 10*s.*, being a deposit of one-half the amount of the passage-money for the passage of the plaintiff and his wife and his children, to wit, &c., from Plymouth to Adelaide, in South Australia, in the inclosed steerage of a ship called the “*Asiatic*,” which the defendants then represented to the plaintiff would sail from London on the 15th of August, 1849, and from Plymouth on the 25th of August, 1849, for Adelaide, wind and weather permitting, and then promised the defendants to pay them the further sum of 32*l.* 10*s.*, being the remainder of the passage-money, prior to the granting of an embarkation order for the plaintiff and his wife and children to embark on board the said ship, the defendants promised the plaintiff that the ship should sail from London on the 15th of August, 1849, and from Plymouth on the 25th of August, 1849, for Adelaide, wind and weather permitting; and that they would then cause the plaintiff, his wife and children, to be carried and conveyed as passengers in the inclosed steerage of the said ship from Plymouth to Adelaide.—Averments, that the plaintiff and his wife and children were at Plymouth on the 25th of August, 1849, and for a reasonable time before, to wit, for

The plaintiff, who resided in Ireland, having applied to the defendants, emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for 65*l.* This letter was written on the fly-sheet of a printed circular, headed “*Emigration to Australia*,” and which (inter alia) stated that ships “will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given.” Then followed a list of ships, amongst which the “*Asiatic*” was named as to sail from London on the 15th of August,

and from Plymouth on the 25th. In another part of the circular it was stated,—“*Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order.*” The plaintiff engaged a berth on board the “*Asiatic*,” and paid the defendants 32*l.* 10*s.* as a deposit, but no written guarantee was given. The “*Asiatic*” did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather. The plaintiff’s berth was kept vacant from London to Plymouth:—*Held*, that the statement in the circular was not a mere representation, but a warranty that the “*Asiatic*” would sail on the days appointed, and that, as she did not, the plaintiff was justified in taking a passage on board another vessel, and was entitled to recover from the defendants the amount of the deposit, and the expenses he had been put to by the delay at Plymouth.

1850.
 CRANSTON
 v.
 MARSHALL.

five days before, ready and willing to become passengers in, and to sail and be conveyed by the said ship, and in the inclosed steerage thereof, from Plymouth to Adelaide; and the plaintiff was, on the said 25th of August, ready and willing to pay the defendants the remainder of the passage-money, to wit, 32*l.* 10*s.*—Breach, that the ship did not sail from Plymouth on the 25th of August, in the year aforesaid, although not prevented by wind or weather, nor had the ship then arrived at Plymouth. Whereby the plaintiff was put to great expense of his monies, to wit, 50*l.*, in and about providing food, lodging, &c., for himself, his wife and children, from the 25th of August, in the year aforesaid, until he obtained a passage on board of another ship, and in and about obtaining a passage on board of another ship, from Plymouth to Adelaide.—There was also a count for money had and received.

Plea, that the defendants did not promise; upon which issue was joined.

At the trial, before *Rolfe*, B., at the London Sittings in last Hilary Term, the following facts appeared:—The defendants, who were ship-owners and ship-brokers residing in London, had for a series of years been engaged in sending emigrant ships to Adelaide, in South Australia. In July, 1849, the plaintiff, who resided in Ireland, having seen the defendants' advertisements of the ships about to be despatched, applied through a friend for particulars of passage-money, &c., in answer to which a letter was written by the defendants, containing the following passage:—“We will agree to give the family a cabin to themselves for 65*l.*” This letter was written on the fly-sheet of a printed circular, the material parts of which are as follows:—

“EMIGRATION TO AUSTRALIA.

“Steerage Passage (including provisions) 15*l.* per Adult.

“With a view to enable respectable persons, who are ineligible to a free passage, to proceed to the Australian colonies

at the lowest possible cost, it has been arranged to despatch a line of superior first class ships, of large tonnage, for the especial accommodation of steerage and other passengers, at an exceedingly low rate of passage-money. These vessels will be subjected to the inspection of her Majesty's emigration officers, and will be despatched on the appointed days (wind and weather permitting), for which *written guarantees* will be given.

1850.
ORANSTON
v.
MARSHALL.

SHIPS.	Tons Burthen.	Commanders.	Ports of Destination.	TO SAIL.	
				From London.	From Plymouth.
Glen Huntley	650	R. Barr	Adelaide and Port Philip	1st August	11th August.
Asiatic.	700	A. S. Waddell	Ditto . Ditto	15th Ditto	25th Ditto.
Hooghly . .	650	W. Henry .	Port Philip and Sydney	1st September.	11th September.

(Then followed a description of the ships).

" Other equally fine ships, similarly fitted &c., will succeed, sailing on the 1st and 15th of each month from London, and the 11th and 25th from Plymouth.

" Passengers from Ireland can readily join the line of ships at Plymouth at a small cost, by the Belfast, Dublin, and Cork Steam Traders, and have every assistance rendered them on their arrival at Plymouth by Marshall & Edridge's agent there.

(Then followed a statement as to provisions, luggage, &c.)

" All packages of baggage to be distinctly marked with the name of the passenger, and also with the words "*wanted on the voyage,*" or "*not wanted on the voyage,*" and must be at the dock, ready for shipment, at least three days prior to the appointed day for sailing; and if sent addressed to the care of Marshall & Edridge, passengers

1850.
CRANSTON
v.
MARSHALL.

need not arrive in London until the morning of that day, thus preventing any unnecessary delay here.

"A deposit of one-half the amount of agreed passage-money to be paid at the time the berths are engaged; the balance to be paid prior to the granting of the embarkation order, and which, in all cases, must bear the signature of Marshall & Edridge.

"The berths are appropriated in rotation as the deposits are paid.

"Persons engaging accommodation for themselves or others, and not actually embarking, will be held responsible for one half of the amount of passage-money, and be required to pay the same whether they may have made a deposit or not.

"For further particulars apply to the undersigned, who are constantly despatching a succession of superior first class ships (regular traders) to each of the Australian colonies.

"MARSHALL & EDRIDGE,

"34, Fenchurch-street, London."

After some correspondence, the plaintiff paid 32*l.* 10*s.* to the defendants, who acknowledged the receipt of it by the following letter:—

"7th August, 1849.

"Sir,—We beg to acknowledge the receipt of your favour of yesterday's date, inclosing 32*l.* 10*s.*, deposit for passage of yourself, wife, and five children, per 'Asiatic,' inclosed steerage.

"Our agent at Plymouth is Mr. Wilcocks, Barbican, who will afford you all needful assistance and information.

"Yours obediently,

"MARSHALL & EDRIDGE."

The plaintiff and his family arrived at Plymouth from Ireland on the 20th of August, when, on inquiry at the office of Mr. Wilcocks, they were informed that the "Asiatic" would not sail from London until the 25th of August,

1850.
CRANSTON
v.
MARSHALL.

or from Plymouth until the 3rd of September. The "Asiatic" left London on the 28th of August, and arrived at Plymouth on the 3rd of September, and sailed for Adelaide on the 4th. On the 31st of August, the plaintiff took a passage for himself and family on board another vessel called the "Constant," then lying at Plymouth, which cleared out from Plymouth for sailing on the 1st of September, but did not in fact sail until the 9th of September. No other guarantee as to the time of sailing had been asked for or given except the circular above mentioned. The berths engaged by the plaintiff were kept vacant between London and Plymouth.

It was objected, on behalf of the defendants, first, that the contract alleged in the declaration was not proved, inasmuch as the circular referred to a written guarantee as to the time of sailing, to be afterwards given; secondly, that the consideration had not wholly failed, because the berths were kept vacant for the plaintiff and his family from London to Plymouth. His Lordship overruled these objections, and a verdict was found for the plaintiff for 40*l.*, being 32*l.* 10*s.* for the amount of deposit, and 7*l.* 10*s.* for the expense which the plaintiff had been put to by the delay at Plymouth, leave being reserved for the defendant to move to enter a nonsuit, or to reduce the damages to 32*l.* 10*s.*

A rule nisi having been obtained accordingly,

Humfrey and Cleasby shewed cause.—The words in the circular, "for which written guarantees will be given," do not mean that there shall be no valid contract unless written guarantees are given, but only that the defendants are ready to give them if required. Even if a written guarantee were necessary, the circular itself formed one, for the contract was based on the terms of the circular and letter written on the fly leaf of it. This is not a contract of an ordinary kind, but one intended for the benefit of emigrants coming from a distance with their families, and it is im-

1880.
CRANSTON
v.
MARSHALL.

portant that they should have some assurance that the vessel will sail at the appointed time. Consequently, *time* is of the essence of the contract. The deposit was paid on the terms that the vessel would sail on the precise day, "wind and weather permitting." It would be a fraud, if the defendants refused a written guarantee; so that they cannot now object that they did not give one. The stipulation in the circular, that all baggage must be at the dock three days prior to the appointed day for sailing, shews that the defendants considered the precise day of sailing a material part of the contract. Then, with respect to the damages: no allegation of special damage was necessary. The plaintiff paid 32*l.* 10*s.*, on an undertaking by the defendants to convey him and his family from Portsmouth to Adelaide; and the defendants having failed to do so, he is entitled to recover back that amount under the special count, or at all events, under the count for money had and received, as upon a consideration which has failed. It is said, that the consideration has not *wholly* failed, because the defendants have kept the berths unoccupied from London to Plymouth; but that is immaterial, for the berths were not ready on the 25th of August.

Martin and *J. Wilde*, in support of the rule.—This is not an absolute contract that the ship shall sail on the appointed days, wind and weather permitting, but a mere representation. The defendants in effect say, "We bonâ fide intend the vessel to proceed on certain days; we will not, however, guarantee that by this document, but written guarantees will be given if required." The circular expressly excludes a warranty, by thus referring to a guarantee thereafter to be given. [*Pollock*, C. B.—Was anything to be paid by the plaintiff for a written guarantee?] Nothing: he had the option of demanding such guarantee, and, not having done so, he cannot succeed in this action. The plaintiff was not entitled to abandon the contract, but only to recover da-

1850.
 CRANSTON
 v.
 MARSHALL.

images commensurate with the expense he had been put to by the non-arrival of the vessel. It was not a condition precedent, that the ship should sail at the precise time indicated: *Ritchie v. Atkinson* (a), *Davidson v. Gwynne* (b), *Constable v. Cloberie* (c). This case is distinguishable from *Glaholme v. Hays* (d), and *Olive v. Booker* (e), for in those cases the language of the charter-party was such that the statement of the time of sailing amounted to a warranty. *Yates v. Duff* (f) is an authority to shew that the plaintiff cannot recover, unless either time was of the essence of the contract, or the delay in sailing was unreasonable. Besides, there has not been an entire but a partial failure of consideration only, for the berths were kept vacant until the arrival of the vessel at Plymouth.

POLLOCK, C. B.—The rule ought to be discharged. The case involves two questions. The first is, whether this document was a guarantee to sail on the day named, or a mere representation. It appears to me that the decision of that question is in reality the decision on both points. Where parties by advertisement hold out that they are ready to give a written guarantee that a vessel shall sail on a particular day, and a contract is entered into specifically on that footing, in substance that is a warranty to sail on the day named. I do not mean to say that there is not room for the argument on behalf of the defendants; but the question being, what is a reasonable construction to be put on the contract which the parties have entered into, practically it comes to this: Was the offer of a written guarantee intended as an assurance to the parties who were about to sail, or was it given merely to animate their vigilance, that they might be ready to sail on the day named? I think that the offer of the guarantee was for the assurance and safe-

(a) 10 East, 295.

(b) 12 East, 381.

(c) Palm. 397.

(d) 2 Man. & G. 257.

(e) 1 Exch. 416.

(f) 5 C. & P. 369.

1850.

CRANSTON
v.
MARSHALL.

ty of the passengers, that they might calculate their means, and might not be wandering about the streets of Plymouth as mendicants, or perhaps sent back to Ireland to the workhouse. It is admitted that nothing was to be paid for a written guarantee, and that shews that the guarantee was in fact given by the advertisement and circular. Then there being a written guarantee to sail on the days named, and the contract being broken, what is the consequence? It has been argued, that the sailing on the days named was not a condition precedent; but there is a distinction between a mutual agreement containing covenants on both sides, and an absolute warranty. Where there is a warranty, it is always of the essence of the contract. The case of *Yates v. Duff* illustrates that. There there was an agreement to sail on a particular day; but that was held not to be of the essence of the contract, because there was no warranty. But here there was a guarantee, and its conditions not having been complied with, the plaintiff was entitled to enter another vessel, if not instant, at all events after waiting a day or two; and though the vessel did not actually sail, he had all reasonable assurance that it would sail; and if he was entitled to do that, as I think he was, without saying at what precise period the right accrued, he is entitled to recover back the money which he paid on the faith of the contract being performed.

ALDERSON, B.—I am of the same opinion. It seems to me that, in this case, *time* was of the essence of the contract; that the contract was broken by the defendants, and, being broken, that the plaintiff had the option of rescinding it by entering another vessel, and therefore entitled to recover back his money.

PLATT, B., concurred.

ROLFE, B.—I am of the same opinion. I will only say,

that the difficulty made on this latter point was not exactly what has been argued now. It was that, by reserving the berths from London to Plymouth, a part of the contract was performed. That has been very little argued, and, indeed, it is not arguable; for if I contract for a berth in a vessel to take me up at Plymouth, the vessel going from France to Australia, and the vessel fails to be at Plymouth, it would be absurd for the owner to say, "I have done something which I ought to have done before I got to Plymouth."

Rule discharged.

1850.
CRANSTON
v.
MARSHALL.

WASHINGTON v. YOUNG and Another.

June 3.

TRESPASS for seizing and taking certain earthenware mugs, and jugs of the plaintiff's.—Plea, not guilty (by statute.)

Under the 5 & 6 Will. 4, c. 68, s. 21, earthen vessels are liable to seizure if ordinarily used as measures, and if on examination they are found to be unjust.

The cause was tried at the Bedfordshire Summer Assizes, 1849, when a verdict was found for the plaintiff, subject to the following case:—

The plaintiff, before and at the time of seizure herein-after mentioned, kept a beer shop, and sold beer to customers out of the house, and to customers to drink the beer in the house. The plaintiff used, for the supply of his customers, pewter vessels and earthen vessels, having two sizes of each sort. When an outdoor customer ordered a quart or a pint of beer, the supply was given in the pewter vessel, and when an indoor customer called for a quart or a pint of beer, the supply was furnished in a pewter or earthen vessel indifferently. The charge for the beer supplied in the larger vessel of each kind was 4d., and the charge for the supply in the smaller vessel of each kind was 2d. The pewter vessels were generally called measures, and the earthen vessels were called mugs. The defendants on a certain day entered the plaintiff's house, to examine the plaintiff's measures, being duly authorised for that

1850.
 WASHINGTON
 v.
 YOUNG.

purpose. The plaintiff's wife, upon being requested to produce her measures, produced the pewter vessels, which were found to be correct in their contents. The defendants, on seeing the earthen mugs upon the shelves, asked the plaintiff's wife if she refused to produce them, upon which she took them from the shelves, and placed them on the table. The defendants tested these earthen mugs by standard measures, and found some of them deficient, and seized two quarts and fourteen pints, found to be deficient upon comparison with standard measures. This action was commenced for such seizure on the 21st of April, 1849. The defendants caused an information to be laid before magistrates, to recover the penalties alleged to have become payable under the statute, by reason of the deficiency of the said earthen mugs, and a conviction was pronounced to the purport set out in the appendix (a), the legal effect

(a) The conviction set out in the appendix was as follows:—
 "Be it remembered, that on &c., John Washington is convicted before us, Edward Orlebar Smith, clerk, and William Dodge Cooper, Esq., two of her Majesty's justices of the peace in and for the county of Bedford: For that the said John Washington, on the 19th of March, 1849, at the said parish of Taddington, in the said county of Bedford, unlawfully had in his possession, in a certain shop there, being the shop of the said John Washington, wherein goods were then kept for sale by measure, fourteen measures, purporting respectively to be pint measures, and two measures, purporting respectively to be quart measures, which said measures, so purporting respectively to be quart measures, were, upon examination thereof, duly made on the day and year last aforesaid,

according to the statute in that behalf, in the said shop, by William Ralph Young, an inspector of weights and measures, duly appointed in that behalf for the district wherein the said shop is situate, and having jurisdiction in the premises, and being duly authorised in writing for that purpose, under the hand of Edward Orlebar Smith, clerk, one of her Majesty's justices of the peace in and for the said county, found to be unjust, contrary to an Act of Parliament passed in the sixth year of the reign of King William the Fourth, intituled "An Act to repeal an Act of the fourth and fifth years of his present Majesty, relating to weights and measures, and to make other provisions instead thereof. And we do adjudge that the said John Washington hath forfeited for his said offence the sum of one pound. Signed and sealed " &c.

of which it is open to the plaintiff to contest upon the argument. If the Court should be of opinion that the plaintiff was entitled to recover, the verdict was to stand, otherwise the verdict was to be set aside, and a nonsuit entered.

1880.
WASHINGTON
v.
YOUNG.

O'Malley, for the plaintiff.—The question turns upon the true construction of the 5 & 6 Will. 4, c. 63 (a); and it is sub-

(a) Sect. 6 enacts, "That from and after the passing of this Act, the measure called the *Winchester* bushel, and the lineal measure called the *Scotch* ell, and all local or customary measures, shall be abolished; and every person who shall sell, by any denomination of measure other than one of the imperial measures, or some multiple or some aliquot part, such as half, the quarter, the eighth, the sixteenth, or the thirty-second parts thereof, shall on conviction be liable to a penalty not exceeding the sum of 40s. for every such sale: Provided always, that nothing herein contained shall prevent the sale of any articles in any vessel, where such vessel is not represented as containing any amount of imperial measure, or of any fixed, local, or customary measure heretofore in use."

Sect. 12 enacts (*inter alia*), "That all measures of capacity which shall be made after the passing of this Act shall have their contents denominated, stamped, or marked on the outside of such measures in legible figures and letters."

Sect. 21 enacts (*inter alia*), "That every person who shall use any weight or measure other than

those authorised by this Act, or some aliquot part thereof as hereinbefore described, or which has not been so stamped as aforesaid, except as hereinafter excepted, or which shall be found light or otherwise unjust, shall on conviction forfeit a sum not exceeding 5*l.*; and any contract, bargain, or sale made by any such weights or measures shall be wholly null and void; and every such light or unjust weight and measure so used shall on being discovered by any inspector so appointed as aforesaid, be seized, and, on conviction of the person using or possessing the same, shall be forfeited: Provided always, that nothing herein contained shall extend to require any wooden or wicker measure used in the sale of lime or other articles of the like nature, or any glass or earthenware jug or drinking cup, though represented as containing the amount of any imperial measure, or of any multiple thereof, to be stamped; but any person buying by any vessel represented as containing the amount of any imperial measure, or of any multiple thereof, is hereby authorised to require the contents of such vessel to be ascertained by a com-

1850.

WASHINGTON

v.
YOUNG.

mitted, that these earthen mugs were not measures liable to be seized by the defendants. The 12th section shews, that the measures contemplated by the statute are such as are required to have their contents stamped on the outside of them. The 21st section, however, expressly provides that nothing therein contained shall extend to require any glass or earthenware jug or drinking cup to be stamped; but any person buying by any vessel *represented* as containing the imperial measure, is authorised to require the contents to be ascertained, and if it be found unjust, the person using it is subjected to the forfeitures and penalties imposed on persons using unjust measures. The 6th section,

parison with a stamped measure, such stamped measure to be found and provided by the person who shall use such wooden or wicker measure, glass jug or drinking cup as aforesaid; and in case the person who shall use such last-mentioned measure or vessel shall refuse to make such comparison, or if, upon such comparison being made, such wooden or wicker measure, glass jug or drinking cup, shall be found to be deficient in quantity, the person who shall use the same shall, on conviction, be subject to the forfeitures and penalties hereinbefore imposed on any person using light or unjust weights or measures."

Sect. 28 enacts, "That in England and Ireland it shall be lawful for every justice of the peace of any county, riding, or division, or of any city or town, and in Scotland for every sheriff, justice, or magistrate of any borough or town, or for any inspector authorised in writing under the hand of

any justice of the peace in England and Ireland, or of any sheriff, justice, or magistrate in Scotland, at all seasonable times to enter any shop, store, warehouse, stall, yard, or place whatsoever within his jurisdiction, wherein goods shall be exposed or kept for sale, or shall be weighed for conveyance or carriage, and there to examine all weights, measures, steelyards, or other weighing machines, and to compare and try the same with the copies of the imperial standard weights and measures required or authorised to be provided under this Act; and if, upon such examination, it shall appear that the said weights or measures are light or otherwise unjust, the same shall be liable to be seized and forfeited; and the person or persons in whose possession the same shall be found shall on conviction forfeit a sum not exceeding 5*l.*," &c.

which imposes a penalty on persons selling by any other than the imperial measure, excepts the case of articles sold in a vessel not represented as containing the imperial measure. The effect of those enactments is, that where earthen vessels are used, the penalty does not attach, unless they are found unjust after a representation that they contain the proper measure. There is good reason for the distinction, since metallic vessels are capable of very nice adjustment, which earthen vessels are not. This, being a penal statute, ought to be construed strictly.

1850.
WASHINGTON
v.
YOUNG.

Toser, for the defendant.—Assuming the plaintiff's construction to be correct, the vessels seized were used for the sale of beer, and consequently were represented as measures. But, under the 28th section, they were liable to seizure, whether they were used as measures or not. The case is not within the proviso of the 6th section; for it is stated as a fact, "that when an indoor customer called for a quart or a pint of beer, the supply was furnished in a pewter or earthen vessel indifferently." Reading the 12th and 21st sections together, all vessels, except glass or earthenware jugs, are liable to be seized if unjust in their contents or not stamped; those jugs do not require to be stamped, but may be seized if represented to contain the imperial measure, when in fact they do not. The latter portion of the 21st section was not intended to interfere with the former, but only to give the customer a summary remedy by enabling him to insist on being supplied with the just measure. Under the Beer Act, 11 Geo. 4 & 1 Will. 4, c. 64, s. 12, none but measures sized according to the standard are allowed to be used; therefore, these are either measures within the 5 & 6 Will. 4, c. 63, or if not, they are illegal measures. The conviction, not having been appealed against under the 35th section, is a decision in rem that these were illegal measures, and that the plaintiff was liable to the penalty.

1850.

WASHINGTON
v.
YOUNG.*O'Malley* replied.

POLLOCK, C. B.—We are all of opinion that the plaintiff ought to be nonsuited. It appears to me, that the meaning of the 28th section is this: that whatever is used as a measure, if, when examined, it turns out to be unjust, is liable to be seized and forfeited. The plaintiff was in the habit of using these measures or pewter indifferently, and when the defendants came for the purpose of examination, no objection was made to the production of the earthen mugs, and they having been found unjust, it was lawful for the defendants to seize them.

ALDERSON, B.—I am of the same opinion. The 28th section enables particular persons to enter any place whatsoever wherein goods shall be exposed for sale, “and there to examine all weights and measures.” Now, we are to consider what are the weights and measures contemplated by that section. They are certainly not stamped measures only, for the language of the section is too large for that. Then let us see whether the 21st section will afford any guide. That section requires all weights and measures, except as thereafter mentioned, to be stamped; it then goes on to provide that “nothing therein contained shall extend to require any glass or earthenware jug or drinking cup, though represented as containing the amount of any imperial measure or of any multiple thereof, to be stamped;” and having before said that stamped measures which are found unjust shall be seized, it goes on to provide that any person who shall use such unstamped measures, if they are found to be unjust, shall on conviction be subject to the forfeitures and penalties imposed on persons using unjust measures. It has been argued that the latter part of that section is not to be construed as applying to measures within the 28th section, and I was at first struck with the argument; but, on consideration, I am of opinion

that all measures of capacity ordinarily used are to be treated as measures within the 28th section, if represented to contain the imperial measure. That is found as a fact in this case, and, consequently, these vessels were liable to seizure.

1850.
WASHINGTON
v.
YOUNG.

ROLFE, B.—I am of the same opinion. I agree with my Brother *Alderson*, that though the case is loosely stated, it means that these earthen vessels were ordinarily represented as of a given measure.

PLATT, B., concurred.

Judgment of nonsuit.

ARMSTRONG v. NORMANDY.

June 10.

THIS was an action of debt. The record commenced as follows:—"I, J. C. Armstrong, the plaintiff in this suit, complains of W. Crozier, the defendant in this suit, who has been summoned &c.; and the plaintiff demands" &c. The declaration contained a count for goods sold and delivered, work and materials, and on an account stated, to which the defendant Crozier pleaded never indebted, and upon that plea issue was joined. The record, after containing the usual form of the *distringas juratores*, then proceeded as follows:—"Before which day, to wit, on &c., the plaintiff gives the Court here to understand and be informed that this action was commenced, and has been prosecuted hence hitherto, against the said W. Crozier, as a person authorised to be sued *as the nominal defendant*, on behalf of a certain Company called 'The Patent Elastic

The plaintiff having brought an action against A. B., for goods supplied to a Joint-stock Company, of which the defendant was a member, and the action having been stayed under the Winding-up Act, 11 & 12 Vict. c. 45, until the plaintiff should prove his claim before the Master, (which he failed to do,) he obtained an order to be allowed to proceed in the action, and to substitute C. D.,

the official manager of the Company, as defendant in lieu of the then defendant. The plaintiff thereupon entered a suggestion on the record, which stated that "the action was commenced and had hitherto been prosecuted against A. B., as a person authorised to be sued *as the nominal defendant*, on behalf of the Company:—*Held*, that the acts of A. B. were not admissible in evidence on the trial of the cause against C. D., as the plaintiff's suggestion alleged that A. B. had been sued as a mere nominal defendant.

1850.
 ARMSTRONG
 v.
 NORMANDY.

Pavement and Kamptulicon Company,' and not otherwise; and thereupon, after the last proceeding in this cause, and after the passing of a certain Act of Parliament, passed" &c. (the Winding-up Act, 11 & 12 Vict. c. 45), to wit, on the 18th of April, 1850, a certain order was made by Sir *E. H. Alderson*, Knight, one of the Barons &c., according to the provisions of the said last-mentioned Act of Parliament, by which order the said Baron did order that A. R. L. Normandy, the official manager of the Patent Elastic Pavement and Kamptulicon Company, be substituted as the defendant in this action, instead of the present defendant W. Crozier; and the plaintiff gives the Court here to understand and be informed that the said A. R. L. Normandy was duly appointed, and still is, the official manager of the said Company, in pursuance of the tenor of the said Act of Parliament, which the said Company do not deny, but admit the same to be true. Afterwards," &c.

At the trial of the cause, before *Pollock*, C. B., at the London Sittings after last term, it appeared that the action was brought in the first instance against Crozier, for the price of some coals supplied to the Company, of which Crozier was a member, but not a director. After the commencement of the action, an order was made by Vice-Chancellor *Knight Bruce*, under the Winding-up Act, for the winding up of the Company. The present defendant Normandy was appointed official manager, and proceedings were stayed until the plaintiff should prove his debt before the Master. The plaintiff, upon his claim having been disallowed by the Master, obtained leave from Vice-Chancellor *Knight Bruce* to proceed in the action, and the plaintiff thereupon obtained a Judge's order to enter the above suggestion on the record, and thereby to substitute the name of the present defendant for that of Crozier. The plaintiff, in the course of the cause, offered in evidence certain admissions made by Crozier. These were objected to on the part of the defendant, as being inadmissible

against him. The Lord Chief Baron, however, was of opinion, that the admissions made by Crozier before and at the time when his name was removed from the record were receivable, as being the admissions of a person whose name was on the record as one of the parties to the suit. It also appeared, that an action had been brought against Crozier by the plaintiff for coals supplied to the Company, and that the plaintiff had succeeded in that action, and Crozier had paid the sum recovered. The plaintiff having obtained a verdict,

1850.
ARMSTRONG
v.
NORMANDY.

Humfrey, in last Easter Term, obtained a rule nisi for a new trial, on the ground that the evidence was improperly admitted.

Crowder and *T. Jones* shewed cause.—The present action was in the first instance brought against Crozier; and, in point of fact, the present defendant's name being substituted for Crozier's under the Winding-up Act(a), Crozier was the real defendant in this action. All admissions made

(a) The following sections are material to the question :—

Sect. 50, enacts, "That, after the appointment of any official manager under this act, all actions, suits, and other proceedings at law or in equity, which might have been commenced, instituted, or prosecuted by or on behalf of the Company, with respect to which such appointment shall be made, against any persons, whether contributories of the Company or not, shall be commenced or instituted and prosecuted by the official manager, by the style and designation of the "Official Manager" of such Company (describing it under the style or firm by which it is described in the order absolute) as

the nominal plaintiff or petitioner, for and on behalf of such Company, and that whether there be one or more official manager or managers; and that all debts which might have been proved by or on behalf of the Company, against the estate of any bankrupt or insolvent debtor to the Company, shall and may be proved against such estate by the official manager of such Company by the style and designation aforesaid; and that all actions, suits, and proceedings at law or in equity, to be commenced or instituted by any persons, whether contributories of such Company or otherwise, against such Company or any person duly authorised to be sued as the no

1850.
 ARMSTRONG
 v.
 NORMANDY.

by Crozier, at the time his name so appeared upon the record, were therefore admissible against the present defendant. The substitution of his name as *official manager* does not affect the question. That substitution was made, in truth, by Crozier for the convenience of the Company, under the 62nd section of the Act, which enacts, "That it shall be lawful for the official manager, with the leave of the Master, to be signified by writing under his hand, to defend, either by his official style and designation or in the name of the original defendant, any action or suit brought against any individual contributory of the Company; but that in such case any judgment or decree to be obtained by the plaintiff shall have the same effect, but no further or otherwise than if the same had been obtained against the original defendant in such action or suit." The substitution, therefore, was not effected under the 52nd section, which has reference to proceedings against the Com-

monial defendant on behalf of the same, shall and lawfully may be commenced, instituted, and prosecuted against the official manager of such Company, (by such style and designation as aforesaid,) as the nominal defendant for and on behalf of such Company, and that whether there be one or more such official manager or managers."

Sect. 52, enacts, "That where any action, suit, or other proceeding shall be pending against the Company, in respect of which such official manager shall have been appointed, or against any person authorised to be sued as the nominal defendant on behalf of such Company, it shall be lawful for the plaintiff in such action, suit, or other proceeding, to substitute the official manager of such Company by such style and designa-

tion as hereinbefore mentioned, as the defendant in such action, suit, or other proceeding, by entering a suggestion on the roll to that effect in such action, and by obtaining an order to that effect in such suit, such order to be obtained on motion or petition without notice; and that it shall be lawful for the plaintiff in such action, suit, or other proceeding, to prosecute the same thenceforward against the official manager, in the same manner and with the same effect to all intents and purposes, and to have the same benefit of any order, decree, judgment, or other proceeding previously made, obtained, and had, as if such action, suit, or proceeding had been commenced against the official manager as defendant under the provisions of this Act."

pany. This may be considered as one and the same action against the Company, of which the defendant Crozier was a contributory, and therefore his acts *prima facie* would bind the Company.

1860.
ARMSTRONG
v.
NORMANDY.

Humfrey and Willes, in support of the rule.—The evidence was not admissible against the Company, who are to be taken as the real defendants in this action. Crozier had no authority from them to make admissions to bind them. The record expressly states, that the plaintiff sued Crozier as the *nominal* defendant on behalf of the Company. It cannot be taken that he was sued in his personal and individual character. The admission of a member of a Company, or even of a director, would not bind the Company, unless such admission were authorised by the body of directors. By the 57th section of the Act in question, "All judgments which shall be entered up in any action at law against the official manager of any such Company, shall have the like effect and operation upon and against the property of such Company, and upon and against the persons and property of the contributories thereof, and shall be enforced in like manner, as if such judgments had been entered up against such Company or against any person duly authorised to be sued on behalf of the same;" and therefore the concluding part of the 52nd section does apply; i. e. after the substitution of the official manager, the plaintiff may proceed against him "in the same manner and with the same effect to all intents and purposes, and have the same benefit of any order, decree, judgment, or other proceeding previously made, obtained, and had, as if such action, suit, or proceeding had been commenced against the official manager as defendant, under the provisions of this Act." [They were then stopped by the Court.]

POLLOCK, C. B.—This rule must be made absolute. At the trial, I considered that the substitution of the name of

1850.
ARMSTRONG
v.
NORMANDY.

the present defendant for that of Crozier was in a form different from that in which it now appears to be, by a more careful consideration of the terms of the suggestion. I certainly imagined that the suggestion was not entered on behalf of the plaintiff, and might well have come to that conclusion; for, no doubt, there was evidence which would lead me to conclude that the present action was brought against Crozier, as the former one was against him, in his personal and individual character. He was one of the members of the Company, and had ordered some coals, for which the former action was brought, in which a verdict was found against him, and he paid the amount so recovered, and this action was brought on his supposed liability, the plaintiff having had no notice of any change with respect to the person liable. I therefore still think that the suggestion is not correct in point of fact; but we cannot go against the record, for, by the plaintiff's own act, it is suggested that Crozier was not sued upon his own personal responsibility, but as the nominal defendant—which in my opinion he certainly was not. We cannot, however, take that into our consideration, for we can look only at the record. The plaintiff must take the consequence of his own blunder; and the consequence is, that Crozier was a mere nominal defendant, for whom the now defendant has been substituted, and, consequently, against the now defendant the acts of Crozier are not admissible in evidence.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Rule absolute.

1850.

BONAR, Manager of the EDINBURGH and GLASGOW BANK,
v. MITCHELL and Another.

May 23.

ASSUMPSIT on a promissory note.—The declaration stated, that the plaintiff was, and was sued as, the manager of a certain society, carrying on the business of banking in Scotland, and called The Edinburgh and Glasgow Bank, and that one J. Lewis, at Leith in Scotland, made his promissory note, payable nine months after date, for 525*l.* 5*s.* 6*d.*, to the order of the defendants, and delivered it to them, and that they indorsed and delivered the same to the said society; that the note was not paid, although duly presented for payment; and that it was then duly protested for non-payment: *whereof* the defendants had due notice, &c.

The defendants pleaded, *fifthly*, that they had not notice that the said note was protested for non-payment, *modo et formâ*, concluding to the country; upon which issue was joined. They also pleaded, *seventhly*, that the said society was formed before the 26th of March, 1826, and from the day and year last aforesaid up to the commencement of the suit, conducted and carried on, and still do conduct and carry on, business for the purpose and at the place in the declaration mentioned; and further, that the said society did not, at any time between the 25th of May and the 25th of July, 1847, deliver to the head collector of stamp duties, at the stamp office in Edinburgh, an account or return according to the schedule marked A, annexed to the Act of Parliament, 7 Geo. 4, c. 67, "An Act to regulate the mode in which certain societies or copartnerships for banking in Scotland may sue and be sued." Verification.—To this plea the plaintiffs replied, by denying that they had not made the return, concluding to the country; and upon that replication issue was joined.

In an action by the manager of a Joint-stock Banking Company upon a note indorsed by the defendant to the Company, the declaration stated, that one L made his promissory note at L. in Scotland, to the order of the defendants, and delivered the said note to them, and that they indorsed it to the Company; that the note was not paid, although duly presented for payment, and that it was protested for payment, *whereof* the defendant had notice. — Pleas, first, that the defendants had no notice of the said note being so protested, *modo et formâ*; and secondly, that the Company, between the 25th of May and the 25th of July, 1847, did not deliver at the Stamp-Office a return

in pursuance of the 7 Geo. 4, c. 67.—Verification.

Held, that the word "*whereof*," after verdict, was not confined to the allegation of protest, and that the declaration was good in arrest of judgment. *Held*, also, that both the pleas were bad non obstante veredicto: the first, on the ground that no protest of an inland note, which it was to be taken to be, was necessary; and the second plea, on the ground that the due making of the return mentioned in that plea was not a condition precedent to the Company's right to recover upon the note.

1850.
BONAR
v.
MITCHELL.

At the trial before *Rolfe*, B., at the Middlesex Sittings in last Hilary Term, a verdict was entered by consent for the plaintiff upon all the issues in the cause, except upon the fifth and seventh, and upon those for the defendant, on certain facts then agreed upon between the parties, with leave to move to enter a verdict for the plaintiff upon those issues also; such motion, and also a motion to arrest the judgment, and to enter a verdict non obstante veredicto upon these issues, were to stand over until it should be ascertained whether an arrangement could be made by the parties. No such arrangement having been made, a rule nisi was obtained by the defendant to arrest the judgment, and a rule nisi by the plaintiff to enter judgment non obstante veredicto upon the issues raised by the fifth and seventh pleas.

Ogle (*Peacock* with him) now shewed cause against the plaintiff's rule.—The fifth plea is good. The note declared upon being a foreign note, notice of protest to the defendants became necessary to render them liable upon their indorsement. In *Story on Bills of Exchange*, § 76, it is said:—"As to Bills of Exchange, it is generally required, in order to fix the responsibility of other parties, that, upon their dishonour, they should be duly protested by the holder, and due notice thereof be given to such parties. And the first question which naturally arises, is, whether the protest and notice should be in the manner, and according to the forms of the place in which the bill is drawn, or according to the forms of the place in which it is payable. By the common law, the protest is to be made at the time, in the manner, and by the persons, prescribed in the place, where the bill is payable. But as to the necessity of making a demand and protest, and the circumstances under which notice may be required or dispensed with, these are incidents of the original contract, which are governed by the law of the place where the bill is drawn. They constitute implied conditions, upon which the liability of the drawer is to attach according to the *lex loci contractus*; and if the bill is negotiated, the like respon-

sibility attaches upon each successive indorser, according to the law of the place of his indorsement; for each indorser is treated as a new drawer." And in § 272, it is laid down that "If there is an acceptance of a foreign bill *supra* protest, or for honour, this does not vary the duties of the holder, and he must give notice thereof to all the parties whom he means to hold responsible to him, the same as in other cases;" and the following section proceeds:—"Immediately then upon the dishonour of a foreign bill, by the refusal of the drawee to accept it, it is in general the indispensable duty of the holder to have the bill duly protested, and notice thereof given to the antecedent parties to whom he looks for reimbursement or indemnity." And *Rogers v. Stephens* (a), and *Gale v. Walsh* (b), are referred to in support of that position. *Robins v. Gibson* (c) is also an authority to shew the necessity of such notice. [Pollock, C. B.—The authorities relied upon have reference to foreign *bills*, but the plaintiff sues by virtue of the statute of Anne, and there is nothing in that Act which requires protest of a foreign note, even upon the assumption that this is such a note.]

The seventh plea affords a good answer to the action. It sets up a good defence under the 7 Geo. 4, c. 67. These Banking Companies are bound to observe the conditions imposed upon them by the Act. The due rendering of the account, as required by the 2nd section, is a condition precedent to the plaintiff's right to sue. By the 1st section, they are entitled to sue by their manager, provided they shall observe the regulations prescribed by the Act. [*Alderson*, B.—According to such an argument, it would be a good defence to a charge of larceny against a person for having stolen the Company's goods, that they had not made any sufficient return as required by the statute. If the Company were to make a single mistake in the course of twenty years, they would lose the right of suing in the mode given

1850.
BONAR
v.
MITCHELL.

(a) 2 T. R. 713.

(b) 5 T. R. 239.

(c) 3 Camp. 334.

1850.
 BONAR
 v.
 MITCHELL.

them by the Act. *Pollock, C. B.*—The 14th section (*a*), which imposes a penalty upon these Companies for neglecting to make the prescribed returns, leads to the conclusion, that the infliction of that punishment was intended to cure all these omissions of duty; for the provision with respect to the imposition of a penalty becomes of no effect whatever, if the existence of the Company is to be destroyed upon the omission to make the return as required by the Act. *Rolfe, B.*—There would be some difficulty in ascertaining the proper party to be proceeded against for the recovery of the penalty. *Alderson, B.*—From these deductions it is clear that the section is merely directory. It may be, for aught that appears upon the seventh plea, that the Company did pay the penalty.]

Lastly, the declaration is bad in arrest of judgment. The

(*a*) That section enacts "That if any such society or copartnership, carrying on the business of bankers under the authority of this Act, shall issue any bills or notes, or borrow, or owe, or take up any money on their bills or notes, without having caused such account or return as aforesaid to be made out and delivered in the manner and form directed by this Act, or shall neglect or omit to cause such account or return to be renewed yearly and every year, between the days or times hereinbefore appointed for that purpose, such society or co-partnership so offending, shall, for each and every week they shall so neglect to make such account or return, forfeit the sum of 500*l.*; and if any officer of such society or co-partnership shall make out or sign any false account or return, or any account or return, which shall not truly

set forth all the several particulars by this Act required to be contained or inserted in such account or return, the society or copartnership to which such officer so offending shall belong shall, for every such offence, forfeit the sum of 500*l.*, and the said officer so offending shall also for every such offence forfeit the sum of 100*l.*, and if any such officer making out or signing any such account or return as aforesaid, shall knowingly and wilfully make a false oath of or concerning any of the matters to be therein specified and set forth, every such officer so offending, and being thereof lawfully convicted, shall be subject and liable to such pains and penalties as by any law now in force persons convicted of wilful and corrupt perjury are now subject and liable to."

word "whereof" refers to the last antecedent only. The declaration, therefore, does not state that the defendant had notice of anything more than the protest for non-payment.

1850.
BONAR
v.
MITCHELL.

Martin, contra.—The declaration is clearly good; the words "whereof the defendant had notice," after verdict, is equivalent to the allegation "of all which the defendant had notice."—He was then stopped by the Court.

POLLOCK, C. B.—We are all of opinion that the rule for judgment non obstante veredicto upon the fifth and seventh pleas must be made absolute, and that the rule to arrest the judgment must be discharged. The fifth plea, which states that the defendant had no notice that the note was protested for non-payment, is bad in substance. Notice of protest is not required by the law of England; and, for aught that appears upon the record, the indorsement which gives the cause of action may have been made in England. We have to administer the law according to the law of England, and not according to the law of Scotland, of which, as far as it has reference to the present case, we may be assumed to have no knowledge whatever.

The seventh plea is also bad. It appears to me to be very clear, that, under the 14th section of this Act, which gives the penalty, the return to the Stamp-Office may be made even after the expiration of the time within which it is directed to be done. It is, therefore, only so far directory, that, upon the payment of the penalty, the party is remitted to his former rights. Now, upon looking at the record, the plea does not in any way deny that the penalty may not have been paid. The declaration is perfectly good, and therefore there is no ground why the judgment should be arrested. The defendant's rule must, therefore, be discharged.

ALDERSON, B., ROLFE, B., PLATT, B., concurred.

Rules accordingly.

1850.

May 25. SIR W. W. WYNN, Bart. v. THE SHROPSHIRE UNION RAILWAYS AND CANAL COMPANY.

By an Act of 12 Geo. 3, a Company was incorporated by the name of the Company of Proprietors of the Chester Canal Navigation Company, for

COVENANT.—The declaration recited, that, on the 21st of January, 1772, by the 12 Geo. 3, c. lxxv, intitled, “An Act for making a navigable cut or canal from the river Dee, within the liberties of the city of Chester, to or near Middlewich and Nantwich, in the county of Chester,” a certain Company was incorporated by the name of The Company, making a canal from Chester to Middlewich; by another Act of the 33 Geo. 3, another Company was incorporated by the name of the Company of Proprietors of the Ellesmere Canal, to make a canal from Shrewsbury to the river Mersey, at Netherpool in Cheshire. By another Act of the 44 Geo. 3, (1804), the Ellesmere Canal Company was empowered to take from the river Dee, at Llandisilio in Denbighshire, a supply of water for their canal, and were also empowered to take water from Bala Lake, for supplying the river Dee with as much water as they should take from it for their canal, or more—and for that purpose to make cuts from the Lake to communicate with the river Dee, at and with such embankments, trenches, and other works as might be necessary for the purpose. In 1807, the Ellesmere Canal Company, by deed, covenanted with Sir W. W. Wynn, Bart., who was then seised in fee of Bala Lake, that they would not at any time thereafter draw off from the said Lake water for the purpose of their said canal, to a lower level than the mark on a certain standard to be erected near the Bala Lake, indicating the mean summer level of the waters of the said Lake, nor would at any time embank or impound up the said water more than one foot above such level. In 1813, the Chester Canal Company and the Ellesmere Canal Company were, by statute, united into one Company by the name of the United Company of Proprietors of the Ellesmere and Chester Canals. By the 7 & 8 Geo. 4, c. cii., all the four previous acts were repealed, and the proprietors of the two Companies were re-united into a new Company, intitled The United Company of Proprietors of the Ellesmere and Chester Canals, for (inter alia) maintaining the former canals then already completed, and making certain new cuts; and it was thereby enacted, that all contracts, covenants, and agreements entered into by virtue of the powers contained in the several repealed Acts should remain in full force, as if the same had been made under the powers contained in that Act: and the Company were authorised to construct such or so many weirs, embankments, and other works, at or near to Bala Lake, and to do and execute all such things as should be necessary for pounding up, &c., and drawing off the water in and from the said pool, so as to be thereby enabled at all times to replace in or restore to the river Dee an equal or greater quantity of water than should or might be taken therefrom by the said United Company, by means of the works at Llandisilio, for the purpose of supplying the canal therewith. By 9 & 10 Vict. c. cccxxii, it was enacted that the Company should thenceforth be called by the name of the Shropshire Union Railways and Canal Company, and that all persons should have the same rights and remedies against The Shropshire Union Railways and Canal Company, which, before the passing of that Act, they had against The United Company of Proprietors of the Ellesmere and Chester Canal:—*Held*, in an action by the devisee of Sir W. W. Wynn against the last-mentioned Company for the breach of the above covenant, by impounding the water of Bala Lake to a height of more than one foot above the mark on the standard, whereby its waters overflowed and damaged the plaintiff's land, that the covenant was repealed by the 7 & 8 Geo. 4, c. cii, as to all acts bona fide done by the Company, under its provisions, for the purpose of restoring to the river Dee a quantity of water equal to what they should abstract for the use of the canal by means of the works at Llandisilio.

Company of Proprietors of the Chester Canal Navigation, for the purposes and under and subject to the provisions, &c., in the said Act mentioned. And that afterwards, to wit, on the 13th of December, 1792, by the 33 Geo. 3, c. xci, intituled, "An Act for making and maintaining a navigable canal from the river Severn, at Shrewsbury, in the county of Salop, to the river Mersey, at or near Netherpool, in the county of Chester, and also for making and maintaining certain collateral cuts from the said intended canal," a certain other Company was incorporated by the name of The Company of Proprietors of the Ellesmere Canal. And that afterwards, to wit, on the 29th of June, 1804, by the 44 Geo. 3, c. liv, intituled, "An Act to enable the Company of Proprietors of the Ellesmere Canal to make a Railway from Ruabon Brook to the Ellesmere Canal, at or near the Aqueduct at Pontcysylltee, in the parish of Llangollen, in the county of Denbigh; and also to make several cuts or feeders for better supplying the said canals with water," the said Company of proprietors of the Ellesmere Canal were, amongst other things, empowered to make, extend, complete, and maintain, a water line or feeder, navigable and passable for boats, barges, and other vessels, from the said Ellesmere Canal, at or near the north-east end of the said aqueduct at Pontcysylltee, in the township of Trevor Issa, and to communicate with the river Dee, in the townships of Llandisilio and Rhyagog, in the parish of Llandisilio, in the said county of Denbigh, and there to take a supply of water from the said river Dee, for the purposes of the said canal, and the collateral cuts and branches thereof; and also to provide and take a sufficient quantity of water out of Bala Pool, otherwise Pimble Mere, in the county of Merioneth, for supplying the said river Dee with an equal or greater quantity of water than should have been taken out of the same river for the purposes of the said canal and the collateral cuts and branches thereof, and for that purpose

1850.
 WYNN
 D.
 SHROPSHIRE
 UNION RAIL-
 WAYS AND
 CANAL CO.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION RAIL-
 WAYS AND
 CANAL CO.

to make, extend, complete, and maintain a cut or feeder from the said pool or mere, at or near the east or lower end thereof, in the parish of Llanycil and township of Bala, in the said county of Merioneth, to, and to communicate with, the said river Dee, in the parish and township of Llanfawr, in the same county, in order to enable the said Company of proprietors to convey water occasionally out of the said pool or mere into the said river Dee, at a lower level than that by which the said water was then discharged from the said pool or mere; and also to make, extend, complete, and maintain another cut or feeder from the river Trewen, in the said parish and township of Llanfawr, in the said county of Merioneth, to, and to communicate with, the river Dee at or in the same parish and township, with such trenches, buildings, erections, and embankments, works, and conveniences, as might be required for the use of the said railway or road, water line, cuts, and feeders, and under such provisions, limitations, and restrictions as were and are in the said last-mentioned Act contained and referred to. The declaration then stated, that long before and at the time of the making of the said last-mentioned Act of Parliament, and from thence continually until and at the time of the making of the indenture hereinafter mentioned, one Sir W. W. Wynn, Bart., (since deceased) was seised in his demesne as of fee of and in the said pool called Bala Pool, otherwise Pimble Mere, in the said last Act mentioned, to wit, of a certain large tract of land covered with water, comprising &c., and being so seised, heretofore and after the passing of the said last-mentioned Act of Parliament, and before the making of the Act of Parliament hereinafter next mentioned, to wit, on the 25th day of March, 1807, by a certain indenture then made between the said Company of proprietors of the Ellesmere Canal of the one part, and the said Sir W. W. Wynn, Bart. (since deceased) of the other part (profert), after reciting, that, by

the said Act of Parliament (44 Geo. 3, c. liv), the said Company of proprietors of the said Ellesmere Canal were authorised and empowered as in the said last-mentioned Act; and also reciting, that it had been agreed between the said Company of proprietors of the said Ellesmere Canal and the said Sir W. W. Wynn, Bart., proprietor of the said mere, previously to the passing of the said last-mentioned Act, that the said Company of proprietors should pay to the said Sir W. W. Wynn, Bart., such annual rent or sum, and should enter into such stipulations and agreements in respect to the drawing off the water from the said pool or mere as thereafter in the said indenture were contained: It was by the said indenture witnessed, that, in consideration of the last-mentioned agreement, and for carrying the same into execution, the said Company of proprietors did thereby for themselves and their successors covenant with the said Sir W. W. Wynn, Bart. (since deceased), his heirs and assigns, amongst other things, that they the said Company of proprietors should and would, yearly on &c., pay unto the said Sir W. W. Wynn, Bart., deceased, his heirs or assigns, the yearly rent or sum of 1*l.* 1*s.*, as a compensation for the water which they should or might take or draw off from the said pool or mere, and also that they, the said Company of proprietors, would erect a regulating weir or standard at Bala Bridge, in the said county of Merioneth, for the purpose of ascertaining the height to which the water in the said pool or mere should rise at different seasons of the year, with a mark thereon to denote the mean summer level of the said pool; and that the said Company of proprietors would not at any time thereafter draw off the water from the said pool or mere for the purpose of the said canal and the collateral cuts, or for any other purposes, to a lower level than the said mark or mean summer level of the said pool, as marked on the said standard; nor would embank

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION RAIL-
 WAYS AND
 CANAL CO.

1850.
WYNN
v.
SHROPSHIRE
UNION RAIL-
WAYS AND
CANAL CO.

or impound up the water of the said pool, so as to raise the same higher than one foot above the said mean summer level, as by the said indenture &c. It was then averred, that the said Sir W. W. Wynn, Bart., continued and was so seised in his demesne as of fee in the said Bala Pool, to wit, the said land covered with water as aforesaid, from the time of the making of the said indenture until the time of his death thereafter mentioned; and that, being so seised, after the making of the said indenture, to wit, on the 19th day of July, 1822, he duly made his will; and thereby, amongst other things, gave and devised the said Pool, to wit, &c., to the use of the plaintiff and his assigns, for the term of the plaintiff's natural life, without impeachment of waste, with remainder to the use of the plaintiff's first and other sons successively in tail male, with divers remainders over; that the said Sir W. W. Wynn, Bart., afterwards, on the 5th of January, 1840, died so seised of the said Bala Pool, with the appurtenances, without having altered his will, whereupon the plaintiff then was and still is seised in his demesne as of freehold for the term of his natural life of and in the said Bala Pool. The declaration then stated, that, after the making of the said indenture, to wit, on the 21st of May, 1813, by a certain other Act of Parliament, 53 Geo. 3, c. lxxx, intituled "An Act for uniting the Interests and Concerns of the Proprietors of the Chester Canal and Ellesmere Canal, and for amending the several Acts of His present Majesty relating to the said Canals," it was, amongst other things, enacted, that, from and immediately after the 30th day of June, 1813, the several persons who were then proprietors of the said Chester Canal, and their successors and assigns, and the several persons who were then proprietors of the said Ellesmere Canal, and their several successors and assigns, should be and were thereby united into a Company for completing, maintaining, and supporting the navigation

of the said canals, according to the rules, orders, and directions therein mentioned and referred to, and should for that purpose be one body corporate, by the style of "The United Company of the Proprietors of the Ellesmere and Chester Canals:" that, also, after the making of the said last-mentioned Act, to wit, on the 21st day of June, 1827, by a certain other Act, 7 & 8 Geo. 4, c. cii, intituled "An Act to amend and enlarge the Powers and Provisions of the several Acts relating to the Ellesmere and Chester Canal Navigation," it was enacted, that, from and immediately after the passing of the said last-mentioned Act, the said several Acts, first, secondly, thirdly, and fourthly mentioned, and all and every the powers, authorities, matters, and things therein respectively contained, should be and the same were thereby repealed; and it was by the said Act, 7 & 8 Geo. 4, c. cii, further enacted, that, from and immediately after the passing of that Act, the several persons who were then proprietors of the said Ellesmere and Chester Canals, and their several successors and assigns, should be and they thereby were reunited into a Company for maintaining and supporting so much and such part or parts of the navigable cuts or canals, railway, and other works by the said several Acts so repealed as aforesaid, or some of them, authorised to be made, as had been then already made and completed; and also for making, maintaining, and supporting a certain intended navigable branch cut or canal, from Wardle Green to Middlewich, and other works to be connected therewith, according to the rules, orders, and directions in the said last-mentioned Act contained; and for that purpose should be one body corporate, by the style and title of "The United Company of Proprietors of the Ellesmere and Chester Canal." And it was further enacted by the said last-mentioned Act, that all conveyances, contracts, agreements in writing, mortgages, bonds, covenants, and securities, made or entered into before the passing of the said

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION RAIL-
 WAYS AND
 CANAL CO.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION RAIL-
 WAYS AND
 CANAL CO.

last-mentioned Act, by virtue of the said powers of the said several Acts by the said last-mentioned Act repealed, or any of the said several Acts, and all sales, transfers, and dispositions, before the passing of the said last-mentioned Act, executed of any share or shares in the joint-stock of the said united Company, and all appointments of proxies, should remain in full force and effect, and should be and continue available in all Courts of law and equity, in the same manner as if the same respectively were or had been made, entered into, or executed, under or by virtue of any of the powers or authorities contained in the said last-mentioned Act. And that also afterwards, to wit, on the 3rd of August, 1816, by a certain other Act, 9 & 10 Vict. c. cccxxii, intituled "An Act for making a Railway from the Chester and Crewe Branch of the Grand Junction Railway at Calveley to Wolverhampton, and for other purposes connected therewith," it was enacted, that, from and after the passing of the said last-mentioned Act, the Company of proprietors of the Ellesmere and Chester Canal should be called by the name of "The Shropshire Union Railways and Canal Company;" and it was also further enacted, that the change of name of "The United Company of Proprietors of the Ellesmere and Chester Canal" should not in any manner prejudice or affect the rights or privileges of the same Company, or against any other persons or corporations; and that all persons and corporations should have the same or the like rights and remedies against the said "Shropshire Union Railways and Canal Company," as they had before the passing of the said last-mentioned Act against "The United Company of Proprietors of the Ellesmere and Chester Canal. The declaration then averred, that, after the passing of the last-mentioned Act, to wit, on the 1st of January, A.D. 1849, and on divers other days, and after the death of the said Sir W. W. Wynn, Bart., party to the said indenture, and whilst the plaintiff

was so seised in his demense as of freehold, &c. as aforesaid in the said Bala Pool, the defendants, not regarding the said Acts of Parliament, nor the said covenant of the said Company of proprietors of the said Ellesmere Canal, in the said indenture contained, did wrongfully and improperly, and without the licence &c., of the said plaintiff, to wit, by then raising and heightening the said weir, in the said indenture mentioned, to a great, to wit, 1ft. 6in. additional height, embank and impound up the water of the said pool called Bala Pool, so as to raise, and did then thereby raise the same higher than 1ft. to wit, 2ft. 6in. above the mean summer level thereof, contrary to the said covenant of the said Company of proprietors of the said Ellesmere Canal, so by them made as aforesaid, whereby &c. the lands of the plaintiff adjoining to the said pool were overflowed and greatly damaged, &c.

1850.
WYNN
v.
SHROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

First plea, that the indenture was so made, &c., after the passing of the 44 Geo. 3, c. liv, intituled, &c.; and further, that, at the time of the making of the said indenture, there was a reasonable probability that the said Company of proprietors of the Ellesmere Canal would not be able, from time to time thereafter, to provide and take a sufficient quantity of water out of the Bala Pool, for supplying the river Dee with an equal or greater quantity of water than might or should under the authority of the same Act be taken out of the same river, for the purposes of the said canal and the collateral cuts &c. thereof, and to supply the river Dee, at or near the city of Chester, in the most proper and convenient place or places for the navigation of that river, with a quantity of water equal at the least to what should, under the authority and pursuant to the provisions of the said Act, be taken from the river Dee by means of the said intended water-line or feeder by the said Act authorised to be made, as by the said Act they the said Company of proprietors of the Ellesmere Canal were authorised and required to do,

1850.
WYNN
v.
SHROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

without, from time to time thereafter, drawing off the water from the said pool or weir to a lower level than the said mark in the said indenture mentioned, and without from time to time embanking or impounding up the water of the said pool, so as to raise the same higher than one foot above the said mean summer level, to wit, to the height to which the defendants so raised the same as in the declaration mentioned. And further, that, at the said times when &c., the defendants committed the said supposed breaches of covenant, &c., for the purpose of so providing and taking a sufficient quantity of water out of the said pool, for supplying the said river Dee with an equal or greater quantity of water than should have been and would necessarily be, under the authority and pursuant to the provisions of the said Act, taken out of the same river for the purposes of the said canal and collateral cuts, &c., and of supplying the said river Dee, at or near the said city of Chester, in the most proper and convenient place or places for the navigation of that river, with a quantity of water equal at least to what should have been and would necessarily be, under the authority and pursuant to the provisions of the said Act, taken from the said river by means of the said water-line or feeder. And further, that the committing of the said supposed breaches of covenant respectively was, at the said several times when the same were respectively committed, necessary for the said purpose for which the same were so committed as aforesaid.--Verification.

Second plea, that the said lake in the declaration mentioned is the same as Bala Pool mentioned in the 7 & 8 Geo. 4, c. cii, and that the said breaches were committed after the passing of that Act; and further that the heightening of the said weir, and the said embanking and impounding up the water in the said pool, as &c., so as to raise, and thereby raising, the same higher than 1ft., to wit, 2ft. 6in. above the said mean summer level thereof, as &c.,

were respectively, at the several times when &c., matters and things then at the said last-mentioned times respectively necessary to be done and executed for pounding, keeping up, retaining, and drawing off the water in the said pool, so as to enable the defendants at all times to replace in or restore to the said river Dee in the last-mentioned Act mentioned, an equal or greater quantity of water than should have been and would be taken therefrom by the defendants, by means of the weir, sluices, and other works in the same Act mentioned, at Llandisilio therein also mentioned, for the purpose of feeding and supplying the canal and collateral cuts in the said Act in that behalf mentioned therewith, under the power or authority for that purpose in the said last-mentioned Act contained. And that they the defendants, at the said several times so as aforesaid, raised and heightened the said weir, and embanked, &c., and raised the said water for the purpose for which the said matters and things were so then necessary, as aforesaid, and by virtue and in pursuance and in execution of the powers given by the same Act in that behalf, as they lawfully might for the cause aforesaid. *Quæ sunt eadem.*—Verification.

Third plea, that, after the passing of the last-mentioned Act, to wit, at the said times when, &c., in the declaration mentioned, the defendants so raised and heightened the said weir as in the declaration mentioned, embanked and impounded the water of the said pool, and raised the water thereof to the height in the declaration mentioned, by virtue and in pursuance and in execution of the powers given by the said last-mentioned Act, and for the purpose of drawing down and conveying into the said river Dee, in the last-mentioned Act mentioned, out of the said pool, an equal or greater quantity of water than should have been and would be taken from the said river Dee into the said canal in the same Act mentioned, by means of the said weirs, sluices, and other works in the same Act mentioned, at

1850.
WYNN
v.
SHROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

Llandisilio aforesaid, and should afterwards have passed through the locks and over the weirs, in the same Act respectively mentioned as having been constructed by the said United Company in the said last-mentioned Act mentioned, at New Martin Moor in the said Act mentioned. And further, that the said heightening and raising of the said weir, and the said embanking &c., were respectively, at the respective places where the said weir was so raised and heightened, and the height of the said water so raised, necessary for the said purpose for which the same weir was so heightened, &c. *Quæ sunt eadem.*—Verification.

General demurrer, and joinder (*a*).

(*a*) The following sections of the several Acts of Parliament are more especially material to the question discussed:—

44 Geo. 3, c. liv, s. 4, after reciting that the Company of the proprietors for preserving the navigation of the river Dee may be injured by the intended water-line or feeder, enacts, "That the said Company of proprietors of the Ellesmere Canal shall be and are hereby authorised and required to supply the said river Dee, at or near the said city of Chester, in the most proper and convenient place or places for the navigation of that river, with a quantity of water equal at least to what shall be taken from the said river Dee by means of the said intended water-line or feeder, and to obtain such supply from other streams or sources than those which already fall into the river Dee, either immediately or through the Ellesmere or Chester Canal."

7 & 8 Geo. 4, c. cii, sect. 5, enacts, "That all conveyances, contracts, agreements in writing, mortgages, bonds, covenants, and securities, made or entered into before the passing of this Act, by virtue of the powers of the said recited Acts hereby repealed, or any of them, and all sales, transfers, and dispositions, before the passing of this Act executed, of any share or shares in the joint stock of the said United Company, and all appointments of proxies, shall remain in full force and effect, and shall be and continue available in all Courts of law and equity, in the same manner as if the same respectively were or had been made, entered into, or executed, under or by virtue of any of the powers or authorities contained in this Act."

Sect. 179, after reciting, that 'the said United Company of proprietors have, under the authority of the said recited Act of the 44th year of the reign

The demurrer was argued last Term (May 1) by

Welsby, in support of the demurrer.—In addition to the

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

of his late Majesty hereby repealed, constructed a weir, sluices, and other works, across the river Dee, in the parish of Llandisilio, in the county of Denbigh, by means whereof they are enabled to take water from the said river for the supply of the said canal and collateral cuts.' And after reciting that 'the said United Company have also, under the authority of the said recited Act, constructed a weir, sluices, and other works at Bala Pool, otherwise Pimble Mere, in the county of Merioneth, whereby the said United Company are enabled to pound up and retain water in the said pool or mere, at a higher level than that at which the water of the said pool or mere stood previously to the making of such weir and other works, and are also thereby enabled occasionally to draw water out of the said pool or weir into the river Dee, at a lower level than that at which the same was discharged into the said river previously to the making of such weir and other works, in order to replace therein the water which may have been taken from the said river by the weir or sluice at Llandisilio, for supplying the said canal and collateral cuts.' And after reciting that 'it is expedient that the said United Company should be empowered to make, maintain, and support such weirs, sluices, and other works at

Llandisilio aforesaid, and to continue to draw water from the said river Dee for the supply of the said canal and collateral cuts, and also to make, maintain, and support such weirs, sluices, and other works at Bala Pool, otherwise Pimble Mere aforesaid, as shall be necessary for pounding up and retaining the water in the same pool or reservoir, and to draw off the water therefrom from time to time as occasion shall require, for the purpose of supplying the said river Dee with the same quantity of water as may have been taken therefrom by means of the weir, sluices, and other works at Llandisilio aforesaid,' enacts, "That it shall be lawful for the said United Company, and they are hereby empowered and authorised, from time to time and at all times hereafter, to maintain and support, make, erect, and construct, such weirs, embankments, sluices, and other works, at and across the river Dee, in the parish of Llandisilio aforesaid, as shall from time to time be necessary, for drawing off the water from the said river Dee into the said canal and collateral cuts, and from time to time, as often as they shall see occasion or think fit so to do, to draw off and take the water from the said river Dee by the means of the said weirs, sluices, and other works at Llandisilio aforesaid, for the purpose of feeding or

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

defence which the defendants have made the subject matter of their pleas, it will also be contended by them

supplying the said canal and collateral cuts therewith."

Sect. 180 enacts, "That it shall be lawful for the said United Company, and they are hereby authorised and empowered, from time to time and at all times hereafter, to maintain and support, make, erect, and construct, such and so many weirs, embankments, sluices, floodgates, and other works, at or near to Bala Pool otherwise Pimble Mere, in the townships of Llanfawr and Bala, in the county of Merioneth, and to do and execute all such other matters and things as shall from time to time be necessary for pounding, keeping up, retaining, and drawing off the water in and from the said pool or mere, so as to be thereby enabled at all times to replace in, or restore to, the said river Dee an equal or greater quantity of water than shall or may have been taken therefrom by the said United Company, by means of the said weir, sluices, and other works at Llandisilio aforesaid, for the purpose of feeding and supplying the said canal and collateral cuts therewith, under the power or authority for that purpose hereinbefore contained, and also from time to time, when and so often as occasion shall require, to draw off the water from the said pool or mere into the said river Dee, in such quantities as shall from time to time be sufficient to replace and restore to the said

river Dee an equal or greater quantity of water than shall have been taken therefrom for the purposes aforesaid."

Sect. 181 provides and enacts, "That the said United Company shall and they are hereby required, from time to time, by means of the weirs, sluices, and other works hereby authorised to be maintained and constructed at Bala Pool, otherwise Pimble Mere aforesaid, to draw down and convey into the said river Dee, from and out of the said pool or mere, an equal or greater quantity of water than shall have been taken from the said river Dee into the said canal by means of the said weirs, sluices, and other works at Llandisilio aforesaid, and shall afterwards have passed through the locks and over the weirs constructed by the said United Company at New Martin Moor, in the parish of St. Martin, in the County of Salop."

Sect. 182.—"And in order that the Company of proprietors of the undertaking for recovering and preserving the navigation of the river Dee, may not be injured by the powers herein granted for supplying the said canal and collateral cuts with water from the said river Dee," further enacts, "That the said United Company of proprietors of the Ellesmere and Chester Canal shall be and they are hereby authorised and required to supply the said river Dee, at or near the said

that the declaration is bad in substance. It will be said, in the first place, that this is not a covenant which runs with the land. But it clearly is such a covenant; for it is an express covenant, which affects the enjoyment of the land. The authorities upon this subject are collected in the notes to *Spencer's case*, 1 Smith's L. C., pp. 29 et seq. Thus, in *Jordain v. Wilson* (a), a covenant by a lessor to supply the premises demised, which consisted of certain houses, with a sufficient quantity of good water, at a rate therein mentioned for each house, was held to be a covenant running with the land, and one for the breach of which the assignee of the lessee might maintain an action against the reversioner. *Abbott, C. J.*, there said, "This is, therefore, a covenant which respects the premises demised and the manner of enjoyment, and I have no doubt, therefore, that it is a covenant which runs with the land." And so in *Easterby v. Sampson* (b), where an undivided

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

City of Chester, in the most proper and convenient place or places for the navigation of that river, and from other sources or streams than those which already fall into the said river, as much water at the least as shall be equal to the quantity taken from the said river Dee into the said canal and collateral cuts at Llandisilio aforesaid, and afterwards passing through the locks and over the weirs at New Martin aforesaid, which shall not have been replaced in or restored to the said river from and out of the said pool or mere, called Bala Pool, in pursuance of the provisions in that behalf hereinbefore contained."

9 & 10 Vict. c. cccxxii, s. 5, enacts, "That the change of name

of the United Company of proprietors of the Ellesmere and Chester Canal shall not in any other manner prejudice or affect the rights or privileges of the said Company, or against any other persons or corporations, and all persons and corporations shall have the same or the like rights and remedies against the Shropshire Union Railways and Canal Company, as they had before the passing of this Act against the United Company of proprietors of the Ellesmere and Chester Canal, except so far as such rights or remedies may be inconsistent with the provisions of this Act."

(a) 4 B. & Ald. 266.

(b) 9 B. & C. 505; 6 Bing. 644, S. C.

1850.
WYNN
v.
SHROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

third part of mines was leased, and the lease contained a covenant by the lessee that he and his assigns should build a new smelting mill, and keep it in repair for working the mines, this covenant was held, first by the King's Bench, and afterwards in the Exchequer Chamber, to run with the land. In the present case, the enjoyment of the land will obviously be disturbed, unless the waters of the lake be maintained at a proper height, so as not to overflow it.

In the next place, the defendants will contend that the original covenant was not binding upon the Company of proprietors of the Ellesmere Canal. But this covenant does not contain any matter in the least degree inconsistent with the provisions of their Acts of Parliament; and it appears upon the face of the deed to have been entered into by the several parties to it in pursuance of an agreement made before the passing of the 44 Geo. 3, c. liv. The covenant was, therefore, as binding upon the Company of the Ellesmere Canal as it would have been upon a private individual.

Lastly, the Company, the present defendants, are liable for a breach of the covenant declared on. The 5th section of the 9 & 10 Vict. c. cccxxii, enacts, "that the change of name of the United Company of proprietors of the Ellesmere and Chester Canal, shall not in any other manner prejudice or affect the rights or privileges of the Company, or against any other persons or corporations; and all persons and corporations shall have the same or the like rights and remedies against the Shropshire Union Railways and Canal Company, as they had before the passing of this Act against the United Company of proprietors of the Ellesmere and Chester Canal, except so far as such rights or remedies may be inconsistent with the provisions of this Act." There never was any actual dissolution of the original Company. By the 53 Geo. 3, c. lxxx, the Chester Canal Company and the Ellesmere Canal Company were

united. The amalgamation was effected for the benefit of each of the Companies, as may be seen by the preamble to the 7 & 8 Geo. 4, c. cii. These Acts may have been passed without notice to private individuals. The effect of the amalgamation is to impose the same liabilities upon the United Company that each Company was subject to before the passing of the Act by which the amalgamation was effected. There is no precise authority upon this point: *Mayor of Colchester v. Seaber* (a), *Mayor of Scarborough v. Butler* (b), *The London, Brighton, and South Coast Railway Company v. Goodwin* (c), may be referred to. The 5th section of the 7 & 8 Geo. 4, c. cii, keeps the covenant alive. The words "by virtue of the powers of the said recited Acts hereby repealed," in that section, are to be read as meaning that, inasmuch as the defendants could not, but for the powers of those Acts, so bind themselves, an agreement made under those powers is binding on them. The objections, therefore, to the plaintiff's right to recover on this covenant fail.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

Bovill, contra.—The pleas afford a good defence to the action. The defendants were compelled to do the acts of which the plaintiff complains. The protection of the navigation of the river Dee was, in truth, the principal object of these Acts of Parliament. The older Act, viz. the 33 Geo. 3, c. xci, contains a clause, viz. the 9th section, which protects the late Sir W.W. Wynn. But the later Act, 44 Geo. 3, c. liv, does not contain any such protecting clause, and that statute is the first which contains any reference to Bala Lake. The legal rights of the Company must depend upon the powers which have been conferred upon them by the Legislature, unfettered by any previous agreement. It is now contended that the statute of 33 Geo. 3, c. xci, is to

(a) 3 Burr. 1866.

(b) 3 Lev. 238.

(c) 3 Exch. 320.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

be restricted by the covenant entered into in 1807. It was not binding upon the Company with whom it was entered into. The directors of a company cannot enter into a private contract with an individual, by which they put a limit upon a power which has been conferred upon them for public purposes. Such a contract is illegal, and therefore void: *Broughton v. Manchester Water Works Company*(a), *Clarke v. Imperial Gas Light and Coke Company*(b), *Attorney-General v. Corporation of Plymouth*(c), *Breynton v. The London & North Western Railway Company*(d), *Regina v. The Eastern Counties Railway Company*(e), *Colman v. The Eastern Counties Railway Company*(f). The public might enforce their rights against the Company by mandamus.

The next question is, whether the Act of Parliament which confers certain powers upon the defendants, subjects them to any liability upon a contract made in contravention of the prior Act. It has been contended that the 5th section of the 7 & 8 Geo. 4, c. cii, transfers the liability upon the contract to the present defendants. If the contract had been in pursuance of the powers of the Act, the argument might have held good. The words of the section are “*by virtue of the powers of*” &c.

The remaining question is, whether this is a covenant running with the land. Now, if this covenant be good, it amounts to an alienation of the right to the water in fee. At all events the pleas are good. It must be assumed, that the parties had notice of the Acts of Parliament which affected their interests; and the enactments upon which the defendants rely, namely, the 179th and following sections of the 7 & 8 Geo. 4, c. cii, by which they are *bound* to keep the river Dee supplied with as much water as they subtract from it, and are empowered to construct such works at Bala

(a) 3 B. & Ald. 1.

(b) 4 B. & Ald. 315.

(c) 9 Beav. 67.

(d) 10 Beav. 238.

(e) 10 A. & E. 531.

(f) 10 Beav. 1.

Pool as are from time to time necessary with that view, clearly override the covenant declared on. It would in truth be *unlawful* for the defendants to continue to perform it: *Bolton v. Crowther* (a), *Brewster v. Kitchen* (b).

1850.
WYNN
v.
SHROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

Welsby replied, and contended that the Acts mentioned in the 179th and subsequent sections of the 7 & 8 Geo. 4, c. cii, being Acts to be done for the benefit of the Company themselves, they were to be done, subject to the existing contracts which the Company or their predecessors had entered into.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C.B.—This case was argued last Term, before my brothers *Rolfe*, *Platt*, and myself. The question arose on demurrer to the pleas. The declaration states an Act of Parliament, 12 Geo. 3, c. lxxv, whereby a Company was incorporated by the name of “The Company of Proprietors of the Chester Canal Navigation,” for the purpose of making a canal from Chester to Middlewich; and another Act, 33 Geo. 3, c. xci, whereby another Company was incorporated by the name of “The Company of Proprietors of the Ellesmere Canal,” for making a canal from Shrewsbury to the river Mersey at Netherpool in Cheshire; and another Act, 44 Geo. 3, c. liv, whereby the Ellesmere Canal Company was empowered to make and maintain a water-line from their canal at Pontcysyllte to communicate with the river Dee at Llandisilio, and thence to take a supply of water for their canal from the said river; and they were also empowered to take water from Bala Lake for supplying the River Dee with as much water as they should take from it for their canal or more, and for that purpose to make cuts from the lake to communicate with the river Dee at Llan-

(a) 2 B. & C. 703.

(b) 1 Salk. 198.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

fawr, with such embankments, trenches, and other works as might be necessary for the purpose. The declaration then proceeds to state, that Sir W. W. Wynn was, at the date of the indenture after mentioned, seised in fee of Bala Lake; and that, by an indenture dated the 25th of March, 1807, made between the Ellesmere Canal Company of the one part, and Sir W. W. Wynn of the other part, the Company covenanted with Sir W. W. Wynn, his heirs and assigns, that they would not at any time thereafter draw off from the said lake water for the purpose of their said canal, to a lower level than the mark on a certain standard to be erected near Bala Bridge, indicating the mean summer level of the waters of the said lake, nor would at any time embank or impound up the said waters more than one foot above such level. The declaration then, after stating the death of Sir W. W. Wynn, and his will, under which the plaintiff became and is tenant for life of Bala Lake, proceeds to state another Act of Parliament, 53 Geo. 3, c. lxxx, whereby the Chester Canal Company and the Ellesmere Canal Company were united into one Company, by the name of The United Company of Proprietors of the Ellesmere and Chester Canals; and also another Act of the 7 & 8 Geo. 4, c. cii, whereby all the four previous Acts were repealed, and the proprietors of the two Companies were re-united into a new Company, intituled The United Company of Proprietors of the Ellesmere and Chester Canal, for, inter alia, maintaining the former canals then already completed, and making certain new cuts; and it was thereby enacted, that "all contracts, covenants, and agreements, entered into by virtue of the powers contained in the several repealed Acts, should remain in full force, as if the same had been made under the powers contained in that Act." The declaration then, after stating another Act of the 9 & 10 Vict. c. cccxxii, whereby it was enacted that the Company should thenceforth be called by the name of The Shropshire Union Railways and Canal Company, and that

all persons should have the same rights and remedies against The Shropshire Union Railways and Canal Company, which before the passing of that Act, they had against The United Company of Proprietors of the Ellesmere and Chester Canal, avers that, after the passing of that last Act, the defendants wrongfully, and in breach of the covenant contained in the indenture of the 25th of March, 1807, impounded up the water of Bala Lake to a height of more than one foot above the mark on the standard, whereby the said waters overflowed on the plaintiff's land, to his damage &c.

To this declaration the defendants have pleaded three pleas. By the first plea they state, that the indenture was made after the passing of the said Act, the 44 Geo. 3, c. liv, and that, at the time of the making of the same, there was a reasonable probability that the Ellesmere Canal Company would not be able to provide a sufficient quantity of water out of Bala Lake for supplying the river Dee with a quantity of water equal to what they should take from thence under the provisions of the then existing Acts, without impounding up the water of the lake to a height exceeding one foot above the said summer level; and that the defendants committed the breaches of covenant complained of, for the purpose of providing and obtaining a sufficient supply of water for the river Dee, as an equivalent for the water taken for the purposes of the canal; and that the committing of the said breaches of covenant was necessary for that purpose. The second plea states, that the breaches of covenant were committed after the passing of the said Act, 7 & 8 Geo. 4, c. cii, and that the impounding up of the water was necessary for the purpose of enabling the defendants to restore to the river Dee a quantity of water equal to what they should abstract for the use of the canal, and that the works were erected for that purpose. The third plea avers, that the impounding in question was done under the provisions of the 7 & 8 Geo. 4, c. cii, and was necessary for enabling the defendants to restore the water

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

1850.
WYNN
v.
SHERROPSHIRE
UNION
RAILWAYS
AND CANAL CO.

to the river Dee. To all these pleas the plaintiff demurred generally.

Mr. *Bovill*, for the defendants, argued in support of the pleas, first, that the covenant was void ab initio; for that as the legislature had, by the 44 Geo. 3, c. liv, given the Company power for the benefit, not of themselves, but of the public, to draw from Bala Lake, and convey to the river Dee, as much water as they should, under the powers of that Act, abstract from the river at a lower point of its course for the purposes of their canal, therefore it was not competent to them by covenant to restrict themselves in the exercise of that power in a way which might be prejudicial to the public. He also contended that the declaration was bad, for that the covenants were not covenants running with the land. It is not necessary for us to give any opinion how far these arguments are well founded, for all the pleas aver in substance, that the works complained of as being erected in breach of the covenant contained in the indenture, were necessary for enabling the defendants to draw down and to convey into the river Dee out of the said lake a quantity of water equal to what should have been taken from the river Dee into their said canal, under the powers of the Acts. Now, by the 7 & 8 Geo. 4, c. cii, ss. 180 and 181, the Company are not only empowered to erect and maintain at Bala Lake all such weirs, embankments, and other works as may be necessary for enabling them to restore to the river from the lake a quantity of water equivalent to what they may draw from the river for the canal, but the statute actually makes it their duty so to do. Under these circumstances, it appears to us perfectly clear, that even assuming the covenant to have been originally good, and to run with the land, yet it is no longer binding on the Company. The legislature has, in fact, made it unlawful for the defendants to perform the covenants in the deed, even supposing them to have been originally valid; and it would be absurd to suppose that an action would lie

against parties for doing that which the legislature has said they shall be obliged to do. The obligation which the defendants entered into by the deed has, by the subsequent Act of the legislature, been rendered impossible to be performed; and it must be taken for granted that due provision has been made by the statute for compensating the plaintiff for the loss which this intervention of the legislature may have occasioned. But on this point we give no opinion, whether the plaintiff has been damaged by the enactment which has put an end to the covenant; and if he has been damaged, then how he is to obtain compensation depends on considerations not now before us. All we have to decide is as to his right for a breach of the covenant in the deed, and we think all right in that respect, if any ever existed, is put an end to by the legislature. It may be proper to notice an argument of the plaintiff, arising out of the 5th section of the 7 & 8 Geo. 4, c. cii, whereby it was provided, *inter alia*, that all covenants entered into before the passing of that Act, by virtue of the powers of any of the repealed Acts, should continue in full force, as if entered into by virtue of the powers of that Act. The plaintiff contended, that this clause kept alive the covenant in the deed. But to that argument there are two answers: in the first place, the covenants in the deed are not covenants entered into by virtue of any of the powers contained in the prior Acts, but contracts altogether collateral to any of the powers thereby conferred; and secondly, even if they were covenants entered into under the powers of the Act, still they would clearly be inconsistent with the subsequent express enactments; and so the 5th section, keeping alive generally all prior covenants, must be construed as, by implication, excluding covenants inconsistent with what is afterwards enacted. On these grounds we are of opinion that judgment must be for the defendants.

Judgment for the defendants.

1850.
 WYNN
 v.
 SHROPSHIRE
 UNION
 RAILWAYS
 AND CANAL CO.

1850.

May 28.

DIGGLE v. THE LONDON AND BLACKWALL RAILWAY COMPANY.

A Railway Company, duly incorporated by Act of Parliament, entered into an agreement, *not under their seal*, with a contractor that he should execute certain works upon their Railway, for the purpose of changing the system of locomotion which they then employed, the rope and stationary engine system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement, entered upon the works, and performed a portion of them, but before they were completed he was dismissed by the Company:—*Held*, that he could not recover the value of this work.

ASSUMPSIT for goods sold and delivered, work, labour, and materials, &c.—Plea, *non assumpsit*; upon which issue was joined.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Term, it appeared that the defendants were incorporated by stat. 6 & 7 Will. 4, c. cxxiii, for making and maintaining a railway from the Minories to Blackwall. By the 105th section of that statute, the directors for the time being superintend the affairs of the Company, use the common seal, and do all that the Company is empowered to do by the statute, except such things as are required to be done at some general or special meeting of the body; no meeting to consist of less than seven directors, and all matters in discussion to be determined by the majority of votes. By the 106th sect. the directors are empowered to appoint committees to act for them; and by the 107th, "all contracts and agreements in writing relating to the affairs of the Company, which shall be signed by any three of the directors of the said Company, shall be binding on the said Company and all other parties thereto, their respective successors, heirs, executors, and administrators; and actions and suits may be maintained thereon, and damages and costs recovered by or against the said Company, or any of the other parties thereto failing in the execution thereof."

The original mode of working the line was by means of stationary engines at each terminus, the engines moving the carriages by ropes attached to them. In the year 1848, the Company resolved to substitute locomotive engines in the place of the stationary engines, and for that purpose, the following advertisement, signed by the secretary of the Company, was inserted in the newspapers:—

“ London and Blackwall Railway Company,”

1850.

DIGGLE

v.

LONDON AND
BLACKWALL
RAILWAY CO.

“ The Directors are prepared to receive tenders for relaying the permanent way, and altering the gauge of this line. A section of the line, and a specification of the work required, may be seen at the office of the Company’s engineer, No. 11, Adam-street, Adelphi. Tenders inclosed in sealed covers, and marked ‘ Tenders for Permanent Way,’ are to be delivered at the offices of the Company, London Terminus, Fenchurch-street, before 12 o’clock on Monday, the 21st instant. The Directors do not pledge themselves to accept the lowest tender.”

As much of the specification referred to as is material, was as follows:—“ The contract consists in taking up the old sleepers, rails, chairs, sheaves, and sheave-frames, and removing them and all other old materials, required by the Company’s engineer to be so removed, to one of the termini to be hereafter decided on by the engineer; in the maintenance of all the works for two months after their entire completion to the satisfaction of the engineer; in loosening the whole of the ballast, and removing those portions that may be considered unfit for use, and providing additional ballast to alter the gradients to the level shewn on the section; in relaying the entire double line from the terminus at Fenchurch-street to the terminus at Blackwall, and all sidings connected therewith; also the laying fourteen switches and fourteen single crossings, together with the rails, chairs, &c., to form through connection; providing all tools required in completing the work, the keys, and trenails, and also the carriage of materials to whatever point they may be required. The Company undertaking to provide the rails, chairs, sleepers, points, and crossings, and to deliver them to the Contractor at Blackwall, &c.”

The plaintiff, by letter of the 19th of August, addressed to the Chairman and Directors of the Company, offered to do the work, according to the specification, for 1436*l.* 15*s.*,

1850.
 }
 DIGGLE
 v.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

and, on the 3rd of October following, the Company, by a letter from the Secretary, accepted the plaintiff's offer. The plaintiff commenced the work in October, in pursuance of the preceding contract, no other contract having been entered into between the plaintiff and the Company; but before the work was completed, he was ordered by the Company to discontinue it, which he accordingly did. The present action was brought to recover the sum of 1778*l.* 18*s.* for the work done, and for materials provided for it. The *Attorney-General*, on the part of the defendants, upon this state of circumstances, objected that the action was not maintainable, on the ground that the defendants, being a corporation, could not be bound by the contract, which was not under their seal. A verdict was entered for the plaintiff for the amount claimed in the action, leave being reserved to the defendants to move to set that verdict aside, and to enter a nonsuit.

The *Attorney-General* having obtained a rule nisi accordingly—

Sir *F. Thesiger*, *Knowles*, and *Atherton* now shewed cause.—The question is, whether the defendants are to be freed from all liability with respect to a contract, the benefit of which they have enjoyed, upon the mere pretext that the contract was not subject to the ceremony of being under the seal of the Company. In former times, the law which required the common seal to be affixed to contracts entered into with corporations, was extremely strict, and very few exceptions were admitted to the general rule; but in more modern times such exceptions have become of more frequent occurrence, and the strict rule has been relaxed in order to meet the exigencies of a more advanced state of society and of an increasing commercial intercourse. In *Com. Dig. tit. 'Francise,' F. 13*, the rule is thus laid down:—“So a corporation aggregate can do nothing but by deed

under the common seal." But several exceptions follow:—"But a corporation which has a head, may give a personal command, and do small acts without deed; as it may retain a servant, a cook, butler, &c." And *Rolfe*, B., in delivering the judgment of this Court in *Mayor of Ludlow v. Charlton* (a), says, "In modern times a new class of exceptions has arisen. Corporations have of late been established, sometimes by royal charter, more frequently by Act of Parliament, for the purpose of carrying on trading speculations; and where the nature of their constitution has been such as to render the drawing of bills, or the constant making of any particular sort of contracts necessary for the purposes of the corporation, there the Courts have held, that they would imply in those who are, according to the provisions of the charter or Act of Parliament, carrying on the corporation concerns, an authority to do those acts, without which the corporation could not subsist. This principle will fully warrant the recent decision of the Court of Queen's Bench in *Beverley v. Lincoln Gas Light and Coke Company* (b)." The present case falls within the class of cases excepted from the general rule, on the ground that the contract is an *executed* contract; and also because the subject matter of the contract is within the very scope and object for which the Company was formed, namely, the making and maintaining of their line of railway. Thus, in *Dunston v. The Imperial Gas Light Company* (c), Lord Tenterden, C. J., said, "I wish, however, to be understood as by no means deciding the question, whether third persons who may sell coal or other materials to the Company, or who may be employed by them as servants or workmen, may or may not maintain an action against them for remuneration, though the contract was not under seal." *Taunton*, J., in his judgment, also adverts to such an exception. And in *Gibson v. East*

1850.
 DIGGLE
 V.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

(a) 6 M. & W. 815.

(b) 6 A. & E. 829.

(c) 3 B. & Ad. 125.

1850.
 {
 DIGGLE
 v.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

India Company (a), *Tindal*, C. J., in delivering the judgment of the Court, said, "And indeed the same principle, that a corporation, established for the purpose of carrying on trade or manufacture, may differ from other corporate bodies as to the power of contracting in matters relating to the purposes for which the company was formed, seems also to have been the opinion of Lord *Tenterden*, as may be collected from his judgment in *Dunston v. The Imperial Gas Light Company*." *Sanders v. St Neol's Union* (b) is a strong authority in favour of the position, that a corporation may be liable upon an executed contract, although not under the corporate seal, where the work is for purposes connected with the corporation: Lord *Denman*, C. J., there said, "A motion in this case was made for a new trial, on the ground that no contract under seal was proved against the defendants. But we think that they could not be permitted to take the objection, inasmuch as the work in question, after it was done and completed, was adopted by them for purposes connected with the corporation." In 2 Kent's Com. 289, it is said, "At last, after a full review of all the authorities, the old technical rule was condemned as impolitic, and essentially discarded; for it was decided by the Supreme Court of the United States, in the case of *The Bank of Columbia v. Patterson* (c), that whenever a corporation aggregate was acting within the range of the legitimate purpose of its institution, all parol contracts made by its authorised agents were express and binding promises of the corporation; and all duties imposed upon them by law, and all benefits conferred at their request, raised implied promises, for the enforcement of which an action lay." *Mayor of Ludlow v. Charlton*, which may be relied upon by the defendants, is distinguishable from the present case, for there the work done was not connected with the purposes of the corporation. In *Lamprell v. The Billericay Union* (d),

(a) 5 Bing. N. C. 562.

(c) 7 Cranch, 229.

(b) 8 Q. B. 810.

(d) 3 Exch. 283.

the agreement contained an express condition that the work was not to be done until the plaintiff had received written instructions from an architect, and the work was not connected with the purposes of the corporation. If workmen are employed by the Company for the purpose of maintaining the line, it can hardly be contended that the Company could escape from their liability to pay their wages on the ground that there had not been any contract under seal between the workmen and the Company. If the Company are liable by the general rules of law, they are not relieved from such liability by their private Act of Parliament.—The following cases were referred to in the course of the argument: *De Grave v. Mayor &c. of Monmouth* (a), *Puine v. Strand Union* (b), *Arnold v. Mayor of Poole* (c), *Marshall v. Corporation of Queenborough* (d), *Smith v. Hull Glass Company* (e), *Barber Surgeons' Company v. Pelson* (f), *London Gas Light Company v. Nicholls* (g), *Mayor &c. of Stafford v. Till* (h), *Fishmongers' Company v. Robertson* (i), *Dean, &c. of Rochester v. Pierce* (j).

1850.
 DIGGLE
 v.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

Martin and Phipson, in support of the rule.—If any argument is to be drawn from the Company's Act of Parliament, it is in their favour; for by the 105th section the directors have the power of using the common seal of the Company; and the 107th section requires written contracts to be signed by three directors; but the plaintiff cannot rest his case upon that section. Upon this point *Cope v. The Thames Haven Dock Company* (k) is in the defendants' favour. The true principle upon which this case must be decided, is to be found laid down in the cases of

(a) 4 C. & P. 111.

(b) 8 Q. B. 326.

(c) 4 M. & Gr. 860.

(d) 1 Sim. & S. 520.

(e) 19 L. J., C. P., 123.

(f) 2 Lev. 252.

(g) 2 C. & P. 365.

(h) 4 Bing. 75.

(i) 5 M. & Gr. 131.

(j) 1 Camp. 466.

(k) 3 Exch. 841.

1850.

DIGGLE

v.

LONDON AND
BLACKWALL
RAILWAY CO.

Mayor of Ludlow v. Charlton, Arnold v. Mayor of Poole, Church v. Imperial Gas Company, and Paine v. The Strand Union; and that principle was also acted upon in the more recent case of *Lamprell v. The Billericay Union*. That principle is, that the use of the common seal may be dispensed with where the matter to be done is either trifling in itself, or of frequent occurrence, or such a matter as the corporation is appointed to do. The subject matter of the contract here does not fall within the principle of the exception. The alteration of the line of road from one system to another is neither a trifling matter, nor one of every day's occurrence, nor can it be said to be essential to the objects of the Company. It might equally be contended, that a contract not under seal with the Company, to lay down the whole extent of their line, would be binding upon them. In such a case, the fact that the contract was executed, and not executory, would make no difference. If the contract, though express, would not be binding, it would be absurd to say that either of the parties could be liable upon an implied contract: *East Water Works Company v. Bailey (a)*, *Marzetti v. Williams (b)*, and *Pothier on Obligations, by Evans*, 69.

POLLOCK, C. B.—I believe we are all of opinion that the rule ought to be made absolute to enter a nonsuit. It is some satisfaction to think that our decision will not prevent the plaintiff from going to another Court, and recovering there, if he really has a good right of action. The foundation of the plaintiff's case is simply, that, having done work for the defendants, a corporation, the contract, therefore, not being executory, but *executed*, and the work being something requisite to be done in the course of the defendants' proceeding as a Railway Company, he is entitled to recover for what he has done under that contract. But the simple answer is, that, in general, a corporation cannot contract

(a) 4 Bing. 283.

(b) 1 B. & Ad. 415.

except by their common seal; and that, though there are excepted cases, this is not one of them, for the work done was neither a matter of necessity, nor of that sort of convenience which requires immediate action. Here the work was considerable, and the time for its performance was also considerable. The evidence shows that the parties never intended to deal as on an implied contract, such as a corporation may, under certain circumstances, enter into without their seal. They intended to contract by writing, and to enter into a solemn and express contract; and the offer of the plaintiff to do the work was accepted on the faith that there would be such a contract. It is however suggested, that, under the Act incorporating this Company, the defendants were competent to contract by their directors without writing, merely by a resolution communicated to the plaintiff authorising him to set about the work; and I am not quite prepared to say that might not be the case; for there is a material distinction between the clauses of this statute and those in *Cope v. The Thames Haven Dock Company*, cited for the defendants; but assuming that the directors here could so contract by resolution communicated to the plaintiff without writing (about which, being a matter of some doubt, I am not prepared to give an opinion); assuming also, as to which there can be no doubt, that they could contract by writing under the hands of three of them; assuming also that they could contract under the seal of the Company, the foundation of my judgment is, that there is no contract under seal, none signed by three directors, and none entered into under such resolution of the directors. There is nothing but the simple contract arising out of circumstances as they are supposed to have existed. It appears to me, on looking at all the cases, that not any one of them would justify us in extending the exceptions to this particular case. No doubt, a corporation is not bound on all occasions to contract by seal, for purposes of convenience, amounting to necessity; in cases where instant assistance is required, so that there may not be time to

1850.
 DIGGLE
 v.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

1850.
DIGGLE
v.
LONDON AND
BLACKWALL
RAILWAY CO.

comply with the form of putting a seal, it may be dispensed with. But it is impossible not to see that the present is not a contract which necessity or immediate convenience renders indispensable; it does not fall within any of the exceptions pointed out in the several cases; and consequently the objection taken at the trial must prevail.

ALDERSON, B.—I am of the same opinion. The question relates to the liability of corporations for work done for them; and the general rule, no doubt, is that they must contract under their corporate seal, that being the only way by which the governing body of a corporation can properly express the mind of the corporation. To this general rule there are no doubt exceptions, all of which, I think, may be classed under one of two heads:—First, when the acts done are such as the corporation, by its very constitution is appointed to do, as in the case of trading corporations, whose duty, by their very appointment, being to draw bills of exchange, they may do it without affixing the common seal. Secondly, when the acts are required for convenience, management, and comfort, as in the cases which have been cited from *Com. Dig. Franchise, F. 13*; as where either the acts are trivial in their nature, and of frequent occurrence, so that the doing them in the usual way would be inconvenient or absurd; or such that an overruling necessity requires them to be done at once; in that case, also, the corporation may proceed by parol, instead of affixing the seal according to the proper and regular course. All these, however, are cases of necessity, and are exceptions to the general rule. But this is not one of those cases; what was done here might be done quite as well by calling the corporation together and by affixing the corporate seal; but as that was not done, the plaintiff is not entitled to recover.

ROLFE, B.—I am also of the same opinion. The plaintiff's counsel stated that this was a case to which much at-

tention would be directed, as our decision would govern many more, and was consequently one of great importance. I agree that it is a case of great importance, both as to the amount in dispute and the principle which it involves. We have to contrast a great number of authorities, both ancient and modern, and we may appear to be acting somewhat hastily in thus giving our judgment at once upon the question, without taking further time for consulting and deliberating among ourselves. I should have thought so if this matter had not been very recently under our consideration; and I have listened in vain for anything to distinguish the present case from those in which the Court has already delivered a well-considered opinion. It is unnecessary to discuss the cases in the Queen's Bench, as they are by no means at variance with that opinion. Whether in all these cases I should have come to the same conclusion—that the acts there done were acts of necessity—it is immaterial to consider, as in all of them the Court proceeded on the ground already stated, and adopted the general rule, that those were cases of urgent necessity, within the exception, which is a rule as much as the rule itself, and has been established by several authorities, namely, that corporations cannot be sued on simple contract, *unless* the act be one of necessity. I say necessity, for that really embraces all the excepted cases;—that is, matters too trivial or of too frequent occurrence, as in the case of trading corporations drawing bills, without which they could not carry on their trade, &c. With these exceptions, the old law remains as it did in the time of Henry VIII, and the earlier times before it. The work done here is done neither on a great necessity, nor is it a matter of frequent occurrence, nor is it one of a trivial nature. It is one solitary act, to be done for a large sum of money; and there is no good reason why the corporation should not have been called together for the purpose of solemnly confirming the contract by affixing the common seal of the Company to it.

1850.
 DIGGLE
 v.
 LONDON AND
 BLACKWALL
 RAILWAY CO.

1850.
DIGGLE
v.
LONDON AND
BLACKWALL
RAILWAY CO.

PLATT, B.— The defendants in the present case are, by the provisions of their Act of Parliament, constituted a corporate body, established for a particular object. As a corporation, they are subject to certain capacities and incapacities—one of such incapacities is, that they are unable to contract except under their corporate seal; but, by the terms of their Act, they are empowered to enter into contracts properly executed by a certain number of directors. This is the only power, with reference to the present matter, which the Act of Parliament gives them. It is, however, contended that the present case falls within the exception to the general rule, upon which general rule the rest of the Court have rested their judgments. I must own that for some time I was struck by the argument; but when it comes to be duly considered, it is difficult to see what limit could be put to it: the argument being, that this Company was established for the very purpose of making and maintaining the railway, and consequently, as the work was done for the very purpose for which this corporation was created, the case falls within one of the classes of exceptions which dispenses with the necessity of affixing the corporate seal to the contract. But the dispensing with the seal was not necessary to the contract, nor would the ceremony of affixing it have prevented the work from being done; where such ceremony, if required, would defeat the objects of the corporation, there, by implication, the corporation is empowered to contract by parol. Such was the case in *Beverley v. Lincoln Gas Light and Coke Company*, where the seal of the Company, if required to be affixed to the particular contract there sued upon, might have been required every twenty-four hours, and it might be impossible to obtain a meeting of the directors for that purpose. If the seal had been required there, the very objects for which the Company was established might have been wholly defeated. But the plaintiff has failed to shew that this case falls within any of the exceptions to the

general rule, that a corporate body cannot contract except under the corporate seal.

Rule absolute.

1850.

DIGGLE

v.

LONDON AND
BLACKWALL
RAILWAY CO.

HERNAMAN and Others, Assignees of R. PENWARDEN, a
Bankrupt, v. CORYTON.

May 29.

THIS was an action by the plaintiffs, as the assignees of one Penwarden, a bankrupt, to recover from the defendant, the sheriff of Cornwall, the proceeds of a sale which took place under two writs of *fi. fa.* directed to the defendant.

The cause came on for trial at the Cornwall Spring Assizes 1849, before *Williams, J.*, when a verdict was found by consent for the plaintiffs, with 2000*l.* damages, subject to a reference to an arbitrator, who was to have the same powers as a Judge at *Nisi Prius*, and to reserve points of law for the consideration of this Court. The facts were as follows:—On the 4th of August, 1847, the bankrupt gave a warrant of attorney to one David Derry, to secure a sum of money; and, on the same day, he gave another warrant of attorney to one Charles Gurney, to secure another debt. Judgments were signed on both these warrants of attorney. The act of bankruptcy took place by means of a declaration of insolvency, signed on the 5th of June, 1848, which was received in London on the following day, having been sent on the 5th. On the 5th of June, Derry and Gurney each issued writs of *fi. fa.* under their respective judgments, directed to the defendant, the sheriff; and under those writs the latter seized the bankrupt's goods. On the 7th of June, the sheriff sold under both the writs, the sale having commenced at nine o'clock on the morning of that day, and having terminated shortly after nine o'clock at night. One of the questions (and the only one which be-

The 5 & 6 Vict. c. 122, s. 4, enacts, that fiats in bankruptcy shall be issued and transmitted by the Lord Chancellor's Secretary of Bankrupts, in such manner as the Lord Chancellor shall by any order direct. The Lord Chancellor, by an order, directed that every fiat directed to any District Court of Bankruptcy should forthwith be sent through the General Post Office to the deputy registrar or registrars of such District Court. A fiat in bankruptcy having been signed by the Lord Chancellor, and sent to the office of the Secretary of Bankrupts, was by him duly put into the post, and arrived at the

District Court on the following day:—*Held*, that the fiat issued at the moment it was put into the post.

1850.
 HERNAMAN
 v.
 CORYTON.

came material to the decision of the Court,) turned upon the title to the proceeds of the sale of such of the goods as were sold after four o'clock in the afternoon of that day, the amount of which portion of the sale was 55*l.* 18*s.* 4*d.* The fiat was signed by the Lord Chancellor on the 7th of June at ten o'clock, was brought to the office of the Secretary of Bankrupts on the same day at five minutes past twelve, and at four o'clock on that day was posted by the said Secretary in a letter to the Registrar of the District Court of Bankruptcy at Exeter, by whom it was received on the following day at ten o'clock. The 5 & 6 Vict. c. 122, s. 4, enacts, "that every fiat in bankruptcy, granted after the commencement of this Act, shall, after the granting of such fiat, be forthwith issued and transmitted by the Lord Chancellor's Secretary of Bankrupts, in such manner and at such cost as the Lord Chancellor, by any general or other order, shall direct, to the Court to which such fiat shall be directed," &c. An order made by the Lord Chancellor, dated the 12th of November, 1842, directed, "that every such fiat, directed to any District Court of Bankruptcy, shall forthwith be sent (except where the Lord Chancellor shall by any special order hereafter direct) through the General Post-office, to the Registrar or Deputy Registrar of such District Court."

The arbitrator, with respect to the several points of law submitted to him, stated in his award, amongst other points, the following:—"If the Court shall decide that, at ten A.M. on the 7th of June, the date and issuing of the fiat was complete, so as to render part of Derry's, and the whole of Gurney's execution invalid, then I award and direct that the verdict for the plaintiffs shall stand, and that for the amount of 296*l.* 13*s.* 5*d.* damages."

"If the Court shall decide that, at five minutes past twelve on the same day, the date and issuing of the fiat was finally complete, so as to render part of Derry's and

the whole of Gurney's execution invalid, then I award and direct that the verdict for the plaintiffs shall stand, and that for the amount of 246*l.* 3*s.* 1*d.* If the Court decide that at four o'clock, P.M., or five minutes past four o'clock, on the same day, the date and issuing of the fiat was finally completed, so as to render part of Gurney's execution invalid, then I award and direct that the verdict shall stand for the sum of 55*l.* 18*s.* 4*d.* damages."

1850.
HERNIMAN
v.
CORYTON.

The case was argued in Easter Term last (April 24), by

Karslake for the plaintiffs.—The question for the decision of the Court is, at what time the fiat was *issued*, under the 4th sect. of the 5 & 6 Vict. c. 122. The plaintiffs contend, that the fiat was issued at four o'clock on the 7th of June, being the time when the fiat was put into the post. In *Freeman v. Whitaker* (a) it was held, that the delivery of the fiat by the Lord Chancellor to his Secretary did not constitute the issuing of the fiat; but, in such case it might well be contended, that the Lord Chancellor had not parted with the dominion of the fiat, so long as it remained in his Secretary's hands. Many cases may be referred to, which, although not expressly in point, have a bearing upon the present question. Thus, in *Dunlop v. Higgins* (b), it was held that a contract is accepted by the posting of a letter declaring its acceptance. The Lord Chancellor there said, "It is a very frequent occurrence, that a party having a bill of exchange, which he tenders for payment to the acceptor, and payment is refused, is bound to give the earliest notice to the drawer. That person may be resident many miles distant from him; if he puts a letter into the post at the right time, it has been held quite sufficient; he has done all that he is expected to do, as far as he is concerned; he has put the letter into the post, and whether that letter be delivered

(a) 4 Exch. 834

(b) 1 H. L. Cas. 381.

1850.
 HERMANAN
 v.
 CORTON.

or not is immaterial; because for accidents happening at the post-office he is not responsible." The cases of *Stocken v. Collin* (a) and *Adams v. Lindsell* (b), are there referred to. In the latter case, an offer for the sale of some goods was made by letter. The letter went, by the error of the party sending it, to the wrong place, but the party receiving it answered it, so far as he was concerned, in proper time, accepting the offer. The party, however, who originally sent the offer, not receiving the answer in proper time, thought he was discharged, and sold the goods to somebody else. The question was, whether the party making the offer had a right to withdraw after notice of acceptance. He sold the goods after the party had written the letter of acceptance, but, before it arrived, he said, "I withdraw my offer." Therefore, he said, "before I received your acceptance of my offer I had withdrawn it," and that raised the question when the acceptance took place, and what constituted the acceptance. It was argued, that "till the plaintiff's answer was actually received, there could be no binding contract between the parties; and that, before then, the defendants had retracted their offer by selling the wool to other persons." But the Court said, "If that was so, no contract could ever be completed by the post, for if the defendants were not bound by their offer, when accepted by the plaintiffs, till the answer was received, then the plaintiffs ought not to be bound till after they had received the ratification that the defendants had received their answer, and assented to it; and so it might go on ad infinitum. The defendants must be considered, in law, as making, during every instant of the time their letter was travelling, the same identical offer to the plaintiffs; and then the contract is completed by the acceptance of it by the latter." *Rex v. Burdett* (c) may be cited, as showing that a party has parted with the dominion over the property when the letter is posted. In

(a) 7 M. & W. 515.

(b) 1 B. & Ald. 681.

(c) 3 B. & Ald. 717.

Hall v. Story (a), it was held that a letter posted in county A, and addressed to and received by the plaintiff in county B, whereby the defendant admits a part of the debt claimed in the action, satisfies the plaintiff's undertaking to give material evidence in county A. [He also cited *Ex parte Bignold* (b).]

1850.
HERNIMAN
v.
CORTON.

Crowder, contra.—The defendant contends that the issuing of the fiat was not complete until it had arrived at its destination in the country, which event took place the day after the sale had been effected. *Freeman v. Whitaker* is a decision that the fiat is not issued although the Lord Chancellor has delivered it to his Secretary. That case seems to have proceeded upon the ground that the Lord Chancellor had not parted with the dominion over the fiat. So here, the Lord Chancellor might counterorder it before it had arrived at its destination. A cheque is not issued until it comes into the hands of the party who is entitled to it. The cases cited have, in truth, no bearing upon this question. If the posting of the fiat were considered to be the date of its issuing, it would follow that a minute of so important an act would be required by the practice of the Bankruptcy Court, but no such practice exists. The posting of the fiat may be one of the steps in the issuing, but the issuing cannot be said to be complete and perfect, within the meaning of this Act of Parliament, until the document has reached its destination.

Karslake, in reply.—There is a distinction to be observed between the *issuing* and the *delivery* of the fiat. It seems that the issuing has precedence in point of time. Under the statute 2 & 3 Vict. c. 29, s. 1, the date and issuing of the fiat was complete by the delivery of it out of the Bankruptcy Office: *Pewtress v. Annan* (c). On the ground of convenience, the time of the posting of the fiat is much the best time for its being said to be issued; for when it has

(a) 16 M. & W. 63. (b) 2 M. & A. 633. (c) 9 Dowl. P. C. 828.

1850.
 }
 HERNIMAN
 v.
 CORTON.

once been posted it cannot be recalled, which is not the case when it is entrusted to the care of a private messenger. If it were otherwise, in the case of miscarriage by the post, much injustice might arise; either the fiat might never arrive, or its arrival in the country might be delayed long beyond the time when it was properly due.

Cur. adv. vult.

POLLOCK, C. B., after stating the facts of the case, now said—The question turns upon the period which is to be fixed upon as the date and issuing of the fiat. Now, it appears that the fiat was posted in London at four o'clock on the 7th of June, pursuant to the Lord Chancellor's order, made under the 5 & 6 Vict. c. 122, but that it did not arrive in the country till the next day. Now, if the issuing of the fiat was complete at four o'clock on the 7th, then all that was sold after that hour would belong to the assignees, and they would therefore be entitled to the proceeds; while all that was sold before that time is to be considered as already appropriated to the payment of the execution creditor. We are of opinion that the putting of the fiat into the post is the issuing of the fiat—that it is the beginning to issue it, and therefore that it is within the words of the Act of Parliament. We are therefore of opinion, that, according to the alternative put to us by the learned arbitrator, the verdict must stand for the sum of 55*l.* 18*s.* 4*d.*, the issuing of the fiat being clearly the putting it into the post, and not its arrival in the country.

Judgment for the plaintiffs.

1850.

THE AMBERGATE, NOTTINGHAM, AND BOSTON, AND EAST-
ERN JUNCTION RAILWAY COMPANY v. COULTHARD.

June 1.

DEBT for calls.—The declaration (which was in the form authorised by the Companies Clauses Consolidation Act, 8 Vict. c. 16, s. 26) stated, that the defendant was the holder of twenty shares in the said Company; and alleged him to be indebted in respect of four different calls, the last of them being a call of 1*l.* 15*s.* per share, made on the 11th January, 1849. The defendant pleaded, first, that he was not the holder of the said shares, or of any or either of them, *modo et formâ*; and secondly, that he was not indebted *modo et formâ*; and upon these traverses issues were joined.

A call made payable by instalments, under the 8 Vict. c. 16, is good; but an action of *debt* will not lie for the recovery of an instalment, before the time for the payment of all the instalments has arrived.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Hilary Term, it appeared that the action was brought to recover the amount of four calls made by the Company. To the first three calls the defendant had no defence. The fourth call of 1*l.* 15*s.* per share was made on the 11th of January, 1849; and the plaintiffs sought to recover, in this action, the sum of 15*l.*, being an instalment of 15*s.* per share, alleged to be payable on the 28th February, 1849. Upon the making of the call, the defendant received the following notice:—

“ Ambergate, Nottingham, and Boston, and Eastern Junction Railway.

“ Fourth Call.

“ No. 253.

“ Nottingham, 11th January.

“ To Joseph Coulthard, Esq., &c.

“ Sir—I beg to inform you that the directors of the above-named Company have this day made a call of 1*l.* 15*s.* per share, payable by two instalments, that is to

1850.
 AMBERGATE,
 NOTTINGHAM,
 AND BOSTON,
 AND EASTERN
 JUNCTION RAIL-
 WAY CO.
 v.
 COULTHARD.

say, 15s. per share on the 28th of February next, and 1L per share on the 7th of May next.

"You are therefore requested to pay the amount on the shares held by you, at any of the under-mentioned banks, on or before the above-named days, at the same time producing this call-letter.

"Interest at 5L per cent. per annum will be charged by the bankers, if the money is not paid when due. No transfer of shares can be allowed until all calls made thereon are paid.

"I am, Sir, your obedient servant,

"JOHN GOUGH, Secretary.

"Call on 20 shares 35L

"Note—The banker, upon receiving payment of the first instalment of the call, is to cut off and transmit to the Company's office this part of the document."

Then followed a copy of the preceding notice. The notice had the following indorsement:—

"Bankers:" [*here followed the bankers' names.*]

"N.B.—Interest after the rate of 5L per cent. per annum will be allowed on sums paid in anticipation of this and future calls; and proprietors desirous of making such payments are requested to apply to the secretary. Extract from sect. 11 of the Act for making the above railway:—
 'Provided always, that no interest shall accrue to the proprietor for any share upon which any call shall be in arrear, in respect of such share, or of any other share held by the same proprietor, while such call shall remain unpaid.'

This action was commenced on the 28th of April, 1849. Upon this state of facts it was contended, on the part of the defendant, that the plaintiffs were not entitled to recover the amount of the instalment upon the fourth call; first, upon the ground that the Company were not entitled to make a call payable by instalments, and therefore

that such call was altogether bad; and secondly, that, at all events, an action of debt could not lie, as both instalments were not due at the time of the commencement of the action. The plaintiffs had a verdict for the whole of their claim, leave being reserved to the defendant to move to reduce the verdict by the sum of 15*l*.

A rule nisi having been obtained for that purpose,

Whitehurst and *Macaulay* shewed cause.—The plaintiffs have to contend that the fourth call was properly made, and that an action of debt will lie for the amount of that portion of the call which was due at the time when the action was commenced. It is, in truth, a call for 1*l*. 15*s*., payable at two different times. The directors of the Company were duly empowered to make a call so payable. The question turns upon the true construction of the 21st and several succeeding sections of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16(*a*), which is embodied in the special Act of the Company. There

1850.
 AMBERGATE,
 NOTTINGHAM,
 AND BOSTON,
 AND EASTERN
 JUNCTION RAIL-
 WAY CO.
 v.
 COULTHARD.

(*a*) The following sections of the 8 & 9 Vict. c. 16, were referred to in the course of the argument:—

Sect. 21 enacts, that "The several persons who have subscribed any money towards the undertaking, or their legal representatives, respectively shall pay the sums respectively so subscribed, or such portions thereof as shall from time to time be called for by the Company, at such times and places as shall be appointed by the Company; and with respect to the provisions herein or in the special Act contained for enforcing the payment of calls, the word 'shareholder' shall extend to and include the legal personal representatives of such shareholder."

Sect. 22 enacts, that "It shall be lawful for the Company, from time to time, to make such calls of money upon the respective shareholders, in respect of the amount of capital respectively subscribed or owing by them, as they shall think fit, provided, that twenty-one days' notice, at the least, be given of each call, and that no call exceed the prescribed amount, if any, and that successive calls be not made at less than the prescribed interval, if any, and that the aggregate amount of calls made in any one year do not exceed the prescribed amount, if any; and every shareholder shall be liable to pay the amount of the calls so made in respect of the

1850.

AMBERGATE,
NOTTINGHAM,
AND BOSTON,
AND EASTERN
JUNCTION RAIL-
WAY Co.
v.
COULTHARD.

is no provision in the general Act, by which the directors are required to fix a particular place or one time

shares so held by him, to the persons and at the times and places from time to time appointed by the Company."

Sect. 23 enacts, that "If, before or on the day appointed for payment, any shareholder do not pay the amount of any call to which he is liable, then such shareholder shall be liable to pay interest for the same at the rate allowed by law from the day appointed for payment thereof to the time of the actual payment."

Sect. 25 enacts, that "If, at the time appointed by the Company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the Company to sue such shareholder for the amount thereof, in any Court of law or equity having competent jurisdiction, and to recover the same, with lawful interest, from the day on which such call was payable."

Sect. 26 enacts, that, "In any action or suit to be brought by the Company against any shareholder to recover any money due for any call, it shall not be necessary to set forth the special matter, but it shall be sufficient for the Company to declare that the defendant is the holder of one share or more in the Company, (stating the number of shares), and is indebted to the Company in the sum of money to which the calls in arrear shall amount, in respect of one call or more

upon one share or more (stating the number and amount of each of such calls), whereby an action hath accrued to the Company by virtue of this and the special Act."

Sect. 27 enacts, that "On the trial or hearing of such action or suit, it shall be sufficient to prove that the defendant, at the time of making such call, was the holder of one share or more in the undertaking, and that such call was in fact made, and such notice thereof given, as is directed by this or the special Act; and it shall not be necessary to prove the appointment of the directors who made such call, nor any other matter whatsoever; and, thereupon, the Company shall be entitled to recover what shall be due upon such call, with interest thereon, unless it shall appear, either that any such call exceeds the prescribed amount, or that due notice of such call was not given, or that the prescribed interval between two successive calls had not elapsed, or that calls amounting to more than the sum prescribed for the total amount of calls in one year had been made within that period."

Sect. 29 enacts, that "If any shareholder fail to pay any call payable by him, together with the interest, if any, that shall have accrued thereon, the directors, at any time after the expiration of two months from the day appointed for payment of such

for the payment of the calls. If the call be properly made in the first instance, that is to say, if there be an interval of three months between each call, and a notice of twenty-one days be given, the statute does not preclude the directors from prescribing the time of the *payment* of the call at their discretion. It is settled, that the resolution of the directors, that a call shall be made, is itself the making of the call under the provisions of this statute: *Ex parte Tooke* (a), in which case *Patteson*, J., said, in a considered judgment of the Court, "On considering the statute and the cases bearing on the subject, it appears, that a call may mean either the resolution formally come to by those who have the power to determine that those who are bound to contribute, i. e. the shareholders, shall pay a certain instalment; or it may be, that resolution together with notice to the persons called on of such resolution having been come to; or the combination of facts making the parties called on liable to an action for non-payment of the money called for. The last meaning not being applicable, the question lies between the other constructions; and we have come to the conclusion that the first is correct, and that a call is made within the meaning of this section when the resolution above described has been come to." So in the case of *The Great North of England Railway Company v. Biddulph* (b), this Court held, that, according to the true construction of the 121st section of the 6 & 7 Will. 4, c. cv, the making of the call was the resolution of the directors. The words of that Act are very similar to those of the present; and that decision may, therefore, be considered as an ex-

1850.
 AMBERGATE,
 NOTTINGHAM,
 AND BOSTON,
 AND EASTERN
 JUNCTION RAIL-
 WAY Co.
 v.
 COULTHARD.

call, may declare the share, in respect of which such call was payable, forfeited, and that whether the Company have sued for the amount of such call or not."

Sect. 75, after certain provisions with respect to the votes of shareholders, provides, that "no

shareholder shall be entitled to vote at any meeting, unless he shall have paid all the calls, when due, upon the shares held by him."

(a) 18 L. J., Q. B., 343.

(b) 7 M. & W. 243.

1850.

AMBERGATE,
NOTTINGHAM,
AND BOSTON,
AND EASTERN
JUNCTION RAIL-
WAY CO.

v.
COULTHARD.

press authority upon this point. The same question incidentally arose in the following cases: *Shaw v. Rowley* (a); *Sheffield, Ashton-under-Lyne, and Manchester Railway Company v. Woodcock* (b); *Birmingham and Aylesbury Railway Company v. Thompson* (c); *Newry and Enniskillen Railway Company v. Edmunds* (d). Inasmuch, therefore, as the resolution of the directors, and the notice that the call is to be paid, are distinct matters, the inference is, that the making of the call precedes the giving of the notice; and when the call is once made, the directors may vary the time of payment or the place where the call is to be paid. Suppose a bank, into which the calls had been ordered to be paid by the notice of the directors, were to stop before the day for payment of the call had arrived, it could not be contended that the directors would not have the power to order the call to be paid into another bank. Upon the same ground there is no sound reason, if the Company be not in need of the whole of the call, why the directors should not be entitled to say that payment of the whole of the call will not be required at the same time. [*Pollock, C. B.*—Assuming that to be so, the Company are not entitled to bring their action for a portion of a call.] That is an objection to the maintenance of the action, and not to the validity of the call. The postponement of the day of payment is clearly a benefit to the debtor, and he cannot be prejudiced in any way by it. By the 146th section of the Brighton Railway Act, 7 Will. 4 & 1 Vict. c. cxix, the directors of the Company are empowered from time to time to make calls, “so that the aggregate amount of calls made or principal money paid for or in respect of any shares shall not amount to more than 50*l.* on any share of that amount, and so that no call shall exceed 10*l.* upon each share, and that the total amount of such calls in any one year shall not exceed 20*l.* upon each share, and so that an interval of

(a) 16 M. & W. 810.

(c) 10 L. J., Q. B., 124.

(b) 7 M. & W. 574.

(d) 2 Exch. 118.

verdict for the defendant on the issue raised
non assumpsit, and for the plaintiff on the

1850.
MURRAY
v.
GREGORY.

for a rule nisi for a new trial, on the
evidence had been improperly received.
was not pleaded, and therefore this evidence was
admissible. The plaintiff is not bound by the statements
of the arbitrator, for an arbitrator to whom matters are re-
ferred by the parties is not thereby constituted an agent
for the purpose of making admissions against them. An
award is not evidence of an account stated: *Bates v. Town-
ley* (a). [*Parke, B.*—It is a mistake to contend that this
evidence was received as an admission by the plaintiff of a
statement made by the arbitrator. Had the award itself
been produced, it would have been admissible against the
plaintiff on the same ground as a judgment establishing
that the plaintiff had no cause of action in regard to the
subject-matter of the suit. Here the award was not in
evidence; but the case of *Slatterie v. Pooley* (b) shews, that
the statements made by the plaintiff were evidence against
him of his having submitted the matter to arbitration,
and of there having been an award against him. The
inference is, that in respect of this matter he never had
any cause of action. What the evidence was worth was
another matter; for it was uncertain whether the award
was decided against the plaintiff on the ground of there
having been no debt due to him originally, or of its having
been paid, or settled by means of a set-off.]

PER CURLAM (c).—There will be no rule.

Rule refused.

(a) 2 Exch. 152.

(b) 6 M. & W. 664.

(c) *Pollock, C. B., Parke, B., Rolfe, B.*

1850.

AMBERGATE,
NOTTINGHAM,
AND BOSTON,
AND EASTERN
JUNCTION RAIL-
WAY CO.

v.
COULTHARD.

arrived. The defendant's objection to the maintenance of the action is founded upon the case of *Rudder v. Price* (a). That is an authority to the effect, that, where there is a *contract* for the payment of a certain sum by instalments, the party who seeks to recover the amount of one instalment cannot sue in *debt* until all the instalments are due. It is difficult to discover any reasonable or intelligible ground for that decision, and, indeed, the Court said they were bound by the precedents. But here the plaintiffs sue by virtue of certain powers given to them by statute. Neither the 25th nor the following section, in speaking of the means to be adopted by the Company in recovering the amount of calls due to them by the shareholders, contains any provisions as to the form of action. The statute does not say that the action shall absolutely be an action of *debt*. [*Rolfe*, B.—The 26th section does not speak of one call or less than a call, but “of one call or more.” The observation may not be entitled to much weight, but it would seem to lead to the inference, that the Company are not entitled to split a call into many parts, and to bring a separate action against the shareholder, under the statute, for the recovery of each part.] The postponement of the payment would be to the benefit of the shareholder. [*Rolfe*, B.—But it would give the Company the power of bringing several actions for the recovery of the call. *Pollock*, C. B.—The powers given by this statute are new, and altogether different from those which are to be exercised at common law. The party availing himself of such powers must bring himself clearly within the provisions of its enactments. Now, the language of the 25th section is, that “if at the time appointed by the Company for the payment of any call, any shareholder fail to pay the amount of such call, it shall be lawful for the Company to sue such shareholder for the amount thereof.” The words are not “the call or any portion of it.” It may be that the Company

(a) 1 H. Blac. 547.

may make the call payable by instalments: that may or may not be, according to the circumstances of the case, in case of the shareholder, but the Company surely cannot sue for a portion of the call.] The right to make the call payable by instalments would be rendered altogether nugatory, if the power to recover the instalments by action were taken away. Suppose part of the call were paid, an action would lie for the residue. [*Pollock*, C. B.—There would be no difficulty in the case suggested, for the action might be brought in the usual form, credit being given for the amount so paid.] The declaration might state that a certain sum, naming it, is due “in respect of one call,” and it is submitted that such an allegation would be unobjectionable.

1850.
 AMBERGATE,
 NOTTINGHAM,
 AND BOSTON,
 AND EASTERN
 JUNCTION RAIL-
 WAY CO.
 v.
 COULTHARD.

Udall, in support of the rule.—Either the call in question is bad, and cannot be recovered at all, or the present action of *debt* will not lie, having been brought before all the instalments become due and payable. It was clearly intended by the legislature that these Companies should not have the power of bringing more than four actions per annum in respect of calls made by them. If the plaintiffs' argument is to prevail, they might harass the shareholders by a multiplicity of actions. The statute restricts the Company to the number of four calls in the year. They seek to evade that provision by calling the payment an instalment. By the 23rd section, interest becomes payable from the day appointed for the payment of the call. By the 29th section, in case of non-payment of a call with interest at the expiration of two months from the day appointed for payment of such call, the share becomes liable to be forfeited. The question then arises, at what time does the forfeiture take place? It is difficult to say whether it is to date from the period of the first or second instalment becoming due. By the 75th section, a shareholder cannot vote until he shall have paid all the calls upon his shares. [*Pollock*, C. B.

1850.

AMBERGATE,
NOTTINGHAM,
AND BOSTON,
AND EASTERN
JUNCTION RAIL-
WAY CO.

v.
COULTHARD.

—The Company could not demand the whole of the sum of 1*l.* 15*s.*; and it is difficult to see how they could declare the share to be forfeited for non-payment of the amount. *Rolfe*, B.—This is making two calls by means of one resolution.] A shareholder would be unable to sell his share, although he might have paid the greater part of the call.

POLLOCK, C. B.—I think that, in substance, it is making two calls by means of one resolution. The rule, therefore, must be made absolute to reduce the verdict by the sum of 5*l.*

Rule absolute (a).

(a) It has since been held, in the following cases, that a call may be made payable by instalments: *Architects, Civil Engineers, &c., Insurance Co. v. Wilson*, Q. B., Mich. Term, 1850; *North*

Western Railway Co. v. M'Michael, Exch. Hil. Vac. 1851; and *Ambergate, &c., Railway Co. v. Norcliffe*, Exch. Ch., Easter Vac. 1851.

June 1.

MURRAY v. GREGORY, Administratrix, &c.

In an action for work and labour, to which the defendant pleads the general issue, a statement made by the plaintiff that the claim which forms the subject of the action was referred to an arbitrator, who found by his award that nothing was due to the plaintiff, is evidence against the plaintiff under the issue raised by that plea.

ASSUMPSIT against the defendant as administratrix, for wages due by the defendant's intestate to the plaintiff. Plea (inter alia), non assumpsit; upon which issue was joined.

At the trial, before *Parke*, B., at the Middlesex Sittings in the present Term, one of the witnesses stated on cross-examination, that he had heard the plaintiff say, that the claim which formed the subject of the present action had been referred to an arbitrator, and that the arbitrator had made an award against the plaintiff. This evidence was objected to on the part of the plaintiff, but was received by the learned Judge, who directed the jury that, unless the award proceeded on the ground that the plaintiff never had any claim against the defendant in respect of the demand in this action, their verdict on the issue of non assumpsit ought not to be influenced by this evidence. The

jury found a verdict for the defendant on the issue raised by the plea of non assumpsit, and for the plaintiff on the other issues.

1850.
MURRAY
v.
GREGORY.

T. Jones now moved for a rule nisi for a new trial, on the ground that this evidence had been improperly received. The award was not pleaded, and therefore this evidence was not admissible. The plaintiff is not bound by the statements of the arbitrator, for an arbitrator to whom matters are referred by the parties is not thereby constituted an agent for the purpose of making admissions against them. An award is not evidence of an account stated: *Bates v. Townley* (a). [*Parke, B.*—It is a mistake to contend that this evidence was received as an admission by the plaintiff of a statement made by the arbitrator. Had the award itself been produced, it would have been admissible against the plaintiff on the same ground as a judgment establishing that the plaintiff had no cause of action in regard to the subject-matter of the suit. Here the award was not in evidence; but the case of *Slatterie v. Pooley* (b) shews, that the statements made by the plaintiff were evidence against him of his having submitted the matter to arbitration, and of there having been an award against him. The inference is, that in respect of this matter he never had any cause of action. What the evidence was worth was another matter; for it was uncertain whether the award was decided against the plaintiff on the ground of there having been no debt due to him originally, or of its having been paid, or settled by means of a set-off.]

PER CURIAM (c).—There will be no rule.

Rule refused.

(a) 2 Exch. 152.

(b) 6 M. & W. 664.

(c) *Pollock, C. B., Parke, B., Rolfe, B.*

1850.

AMBERGATE,
NOTTINGHAM,
AND BOSTON,
AND EASTERN
JUNCTION RAIL-
WAY CO.

v.
COULTEARD.

—The Company could.

of 1*l.* 15*s.*; and it

the share to 1

Rolfe, B.—

lution.]

author

Wm. FLETCHER.

This dividend in this case had obtained a judge's order in the following terms:—"It is ordered, that the plaintiff do forthwith give security for costs, to the satisfaction of the Master, no stay of proceedings in the mean time, the attorney for the plaintiff hereby undertaking to find such security." No further steps were taken, and no security to the said was given.

Maynard had obtained a rule, calling upon the plaintiff's attorney to shew cause why an attachment should not issue against him for not having given such security.

Held, that the proper construction of the order was, that the attorney should give the security in case further proceedings were taken, and, therefore, that he was not liable to an attachment for not giving the security, no further proceedings having been taken.

Lush now shewed cause.—The attorney has not been guilty of any contempt of Court. The order specifies no time, and the Court will not take upon itself to fix any time for the giving of the security. The meaning of the order is, that, should further proceedings be taken, the attorney is then to find security for costs. In *Kelly v. Brown* (a), the Court refused to superadd to a rule for security for costs, the term, that the plaintiff should be at liberty to sign judgment as in case of a nonsuit, if the security should not be given within fourteen days.

Maynard, in support of the rule.—The alternative is expressly excluded by the form of the rule. The order expressly states, that the plaintiff do *forthwith* give security. No effect whatever is given to that term, by the strained interpretation sought to be fixed upon the language of the order. The plaintiff's attorney was to give the security, whether further proceedings were taken or not. The order was obtained in the present form, for the purpose of avoid-

inconvenience which arose in the case of *Kelly v. Brown*. There is to be "no stay of proceedings in the meantime."

1850.
HILL
v.
FLETCHER.

POLLOCK, C.B.—I think this rule ought to be discharged. Although I am willing to pay the utmost deference to what Mr. *Maynard* has urged upon this matter, yet I still think that the reasonable construction of this order is, that whereas the proceedings might have been stayed in the ordinary way, the defendant is not to be put to the trouble of setting them aside; and, therefore, the attorney agrees to make himself liable for any costs incurred in case any further steps are taken. In other words, he says, "If I go on, I undertake to give security." It might have been more clearly expressed, but I think that such is the proper construction of it.

ALDERSON, B.—The whole difficulty in putting a meaning upon the order arises from the insertion of the word "forthwith;" but I think the sensible interpretation of the order is, that the attorney is to give the security in case further proceedings are taken.

ROLFE, B.—I have entertained some doubt upon the matter. The question is, whether the undertaking of the attorney is the price of proceeding, or of the liberty to proceed. If it be the price of proceeding, then the view adopted by my learned brethren is correct; if it be of the liberty to proceed, then Mr. *Maynard's* argument is correct. Upon the whole, I am inclined to think that the view taken by my Lord Chief Baron and my brother *Alderson* is the right one.

PLATT, B., concurred.

Rule discharged.

1850.

June 10.

THE SOUTH STAFFORDSHIRE RAILWAY COMPANY *v.*
SMITH.

To an action of debt for calls by a Railway Company, the defendant pleaded in abatement his privilege, as an attorney of the Court of Common Pleas, to be sued in that Court: to this the plaintiffs replied, that the defendant was an attorney of this Court; and the plea, after the prayer of judgment by inspection of the record, concluded by an entry of continuance by cur. adv. vult., and a day for judgment was given to the plaintiff:—*Held*, that the plaintiffs were entitled to judgment, although there was no rejoinder, as it appeared that the defendant was an attorney of this Court.

DEBT for calls on shares in the South Staffordshire Railway Company. Plea—The defendant in his own person says, that, before and at the time of the commencement of this suit, the defendant was, and thence hitherto hath been, and still is, one of the attornies of the Court of our Lady the Queen of the Bench at Westminster, and during all the time aforesaid hath prosecuted and defended and still doth prosecute and defend divers suits and actions in the last-mentioned Court, for divers and very many persons, &c. That he and all other the attornies of the Court, prosecuting and defending suits and actions for their clients in that Court, by an ancient and honourable custom of such Court from time immemorial used and enjoyed, ought to be free and exempt not to be sued in any other Court:—concluding with a verification and prayer of judgment if the Court would or ought to take cognizance, &c. Replication, that, notwithstanding anything by the defendant in the said plea above alleged, this Court ought to take and will take cognizance, &c., because the plaintiffs say, that the defendant, at the time of the commencement of the suit, was, and still is, one of the attornies of the Court of our Lady the Queen before the Barons of her Exchequer at Westminster, as by the record of the enrolment of the attornies of the said Court of our Lady the Queen, before the Barons of the Exchequer at Westminster, fully appears. And this plaintiffs are ready to verify by the said record as the Court shall direct; and they pray that the said record may be seen and inspected by the Court here. The proceedings were then continued thus:—And because the Court here is not yet advised what judgment to give in the premises, a day is given to the said parties here, until

the 10th of June in this said term, to hear the judgment of the Court here: Thereupon, &c.

Burnie, on the part of the plaintiffs, now moved for judgment on the production of the record and roll mentioned in the replication, with the defendant's signature thereon.

Pigott shewed cause, and contended that there was no issue joined, and no rule to rejoin.

Burnie.—*Jackson v. Wickes* (a) is an authority expressly in the plaintiffs' favour. That was an action of debt on a bail recognizance, to which the defendant pleaded, that since the judgment against the principal, no ca. sa. had been sued out against him and duly executed, as, according to law and immemorial custom of the Court, before the commencement of the suit, there ought to have been. The plaintiff replied, that since the judgment he had sued out a ca. sa., which he set out, as by the said writ and return, duly returned and filed, would appear, concluding with an averment of readiness to verify by the record, and praying that the record of the writ and return thereto might be seen by the Court. The defendant demurred, on the ground that there was no issue joined between the parties, whether or not there was such a record in Court; that, by setting out the record of the writ the plaintiffs had introduced new matter, to which there must be a rejoinder by the defendant before the issue could be perfect. The Court overruled the demurrer. Other cases might be cited to the same effect.

Pigott, contra—That case is not an authority in point, for there was there a complete issue; one side having denied the existence of a certain writ of *capias*, which the other affirmed and offered to verify by the record; so that the addition of the *similiter* alone was necessary, and

1850.
SOUTH STAFF-
ORDSHIRE
RAILWAY CO.
v.
SMITH.

(a) 7 Taunt. 30.

1850.
 SOUTH STAFF-
 FORDSHIRE
 RAILWAY Co.
 v.
 SMITH.

there could be no other rejoinder. But when, as here, the defendant pleads privilege, on the ground of his being an attorney of another Court, it is unnecessary to insert the negative averment, that he is not also an attorney of the Court in which he is sued: *Graham v. Ingleby (a)*, *Walford v. Fleetwood (b)*; so that if the plaintiff replies that he is also an attorney of that in which he is sued, concluding with a verification, both the plea and replication are pleadings in confession and avoidance, consequently there is no affirmative and negative, and therefore no issue. The Reg. Gen. Hil. 2 Will. 4, r. 108, dispenses with a rule to rejoin, and all special pleadings, where the plaintiff takes issue on the defendant's pleading, or traverses the same, or demurs, so that the defendant is not let in to allege any new matter. But the defendant might, in the present case, have pleaded new matter by way of rejoinder. The defendant is desirous of having the opportunity, either by demurrer or by plea in confession and avoidance, of raising the question, whether the privilege of an attorney of the Common Pleas to be sued in that Court is to be taken away, because the recent statutes allow him to practise here also.

Burnie.—*Jackson v. Wickes* is in point, and the form of pleading there adopted is in accordance with the precedent in 2 Chitty Pl. 1103, 6th edit., which is taken from the old forms. In a case like the present, where the existence of a record of the Court in which the proceedings are, is averred, no formal issue is required. *Walford v. Fleetwood* is an authority, that a person who is attorney of more than one of the superior Courts may be sued in either of them.

POLLOCK, C. B.—Upon the authorities, I am of opinion, that our judgment ought to be for the plaintiffs.

ALDERSON, B.—There is a case in Dyer, 228a, pl. 45,

(a) 2 Exch. 442.

(b) 14 M. & W. 449.

where, the defendant having pleaded a plea of a record of the same Court, the plaintiff replied nul tiel record, concluding with an offer to verify as the Court should direct; and a day was thereupon given to the parties for the production of the record, on the ground that the Court could inspect its own records. And in *Jackson v. Wickes*, where, the plaintiff having replied nul tiel record, concluding with a prayer that the record might be inspected by the Court, the defendant demurred, on the ground that he was prevented from replying to the plaintiff's pleading, the Court held it good. These cases seem to have proceeded on the principle of cutting away immaterial matter, which is an extremely good principle, and one to which we had better adhere.

1850.
SOUTH STAFF-
ORDSHIRE
RAILWAY CO.
v.
SMITH.

ROLFE, B., and PLATT, B., concurred.

Judgment of respondeat ouster.

BURKINSHAW v. THE BIRMINGHAM AND OXFORD JUNCTION RAILWAY COMPANY.

June 5.

DEBT.—The declaration stated, that, before the commencement of this suit, and before the giving of the notice next hereinafter mentioned, to wit, on &c., to wit, under and by virtue of the provisions of a certain Act of Parliament, (9 & 10 Vict., Aug. 3) intitled "An Act for making

The words
"lands which
shall have been
taken for or in-
juriously af-
fected by the
execution of
the works,"
in the 68th

section of the Lands Clauses Consolidation Act, 8 Vict. c. 18, include such lands only as are *actually* taken or *actually* affected by the works.

A., the proprietor of certain houses, which were liable to be taken for making a Railway, under the provisions of the local Act of the promoters of the undertaking, received a notice under the 18th section of the 8 Vict. c. 18, from the promoters, that the property would be required by them for the Railway, and the notice demanded the particulars of A.'s interest therein, and stated their willingness to purchase it. A. duly furnished these particulars, and a sum of 4500*l.* was set upon the property by him, which amount he claimed from the promoters as a compensation for taking the property, and he required payment thereof, or that a warrant should be issued by the Company, to summon a jury to assess the proper amount, under the provisions of the Act. The Company took no further step in the matter:—*Held*, that, under these circumstances, A. could not maintain an action to recover from them the 4500*l.*

1850.

BURKINSHAW

v.

BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester, and Wolverhampton Railways, and to be called 'The Birmingham and Oxford Junction Railway;' and of a certain other Act of Parliament, (9 & 10 Vict., Aug. 3) intituled "An Act for making a Railway into Birmingham, in extension of the proposed Birmingham and Oxford Junction Railway," the defendants were incorporated, and were thereby authorised and empowered to make and maintain a Railway therein described and specified, and to execute the works necessary for the same, and to take such of the lands therein mentioned as should be necessary for the purposes of the said Acts and the works thereby authorised; and that, before the commencement of this suit, and before and at the time of the giving of the said notice, the plaintiff was seised of certain lands, that is to say, certain messuages, &c., in Birmingham, and described in the books of reference deposited with the clerk of the peace for the county of Warwick, being the plans and books mentioned and referred to in the secondly above-mentioned Act, and the said lands being lands which the said Company were authorised and empowered, by virtue of the Acts of Parliament, to take for the purposes of making and maintaining the said Railway, that is to say, The Birmingham and Oxford Junction Railway. And that the plaintiff being so seised as aforesaid, the defendants, to wit, on the day and year aforesaid, required to take the said lands of the plaintiff, for the purpose of making and maintaining the said Railway. And that the defendants thereupon, after the passing of the said Acts, to wit, on the 9th of January, 1847, caused a certain notice in writing to be served upon the plaintiff, whereby notice was given by the defendants to the plaintiff, that the said Railway would pass through the said lands of the plaintiff, and that the defendants required to purchase and take the same, for the purposes of the said Railway, and that the defendants were willing to treat for the purchase thereof,

and of all estates and interest therein, and as to the compensation to be made to all parties for the damage that might be sustained by reason of the execution of the works of the said Railway. And that the defendants, by their said notice, demanded from the plaintiff the particulars of his estate and interest in the said lands, and of the claims made by him in respect thereof; and that the said notice did state the particulars of the said lands so required; and that the defendants did, to wit, at the said time of serving the said notice, take the said lands of the plaintiff, for the execution of the works of the said Railway; and the plaintiff thereby, then being so seised as aforesaid, became and was entitled to a large sum, exceeding 50*l*., to wit, the sum of 4500*l*., as compensation from the defendants in respect of the said lands and of his interest therein; and that the plaintiff and the defendants did not, within twenty-one days after the service of the said notice by the said defendants, or at any time, agree as to the amount of compensation to be paid by the defendants for the said interest of the plaintiff in the said lands, or for any damage that might be sustained by him by reason of the execution of the works, or as to the amount of any other compensation; and that afterwards, to wit, on the 17th of July, 1849, to wit, after the expiration of the said space of twenty-one days, the plaintiff being so entitled to such compensation, and the compensation to which he was so entitled exceeding the sum of 50*l*., and the defendants not having made, and no one having made satisfaction of or for the said compensation, or the said taking of the said lands, and the said compensation, being the compensation for the said taking, still remaining wholly unpaid, the plaintiff, then being seised as aforesaid, claimed such compensation to an amount exceeding 50*l*., to wit, 4500*l*., and the plaintiff then was desirous to have the question of the said compensation so claimed by the plaintiff as aforesaid settled by a jury, and then gave to the defendants a notice in writing, (according to the pro-

1850.

BURKINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

1850.
BURKINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

visions of the statute in such case made and provided, to wit, the Lands Clauses Consolidation Act, (1845), that he was desirous to have the question of the compensation to which he was so entitled as aforesaid, in respect of his said estate and interest, and in respect of any damage that might be sustained by him by reason of the execution of the said railway works, settled by a jury; and the said last-mentioned notice also stated the nature of the interest in the said premises, in respect of which the plaintiff claimed such compensation as aforesaid, and the amount of compensation so claimed, to wit, 4500*l*. Averment, that although twenty-one days after the giving of the said last-mentioned notice elapsed long before the commencement of this suit, yet the defendants did not, within the said period of twenty-one days, nor at any time before the commencement of this suit, pay to the plaintiff the amount of the said compensation so claimed by him as aforesaid, nor enter into any written agreement for that purpose, nor did nor would the defendants, within the said period of twenty-one days after the receipt of the said last-mentioned notice, nor at any time before the commencement of this suit, issue their warrant to the sheriff to summon a jury for settling the question of the compensation so claimed by plaintiff as aforesaid, in the manner provided by the said last-mentioned statute, or in any other manner, but on the contrary wholly neglected and refused so to do, and until and at the commencement of this suit still neglected and refused so to do, contrary to the form and provisions of the said last-mentioned statute; whereby and by force of the said statute, the defendants became liable to pay to the plaintiff the said sum of 4500*l*. in the said last-mentioned notice specified, being the amount of compensation so claimed by the plaintiff as aforesaid; and thereby, and by force of the said last-mentioned statute, an action hath accrued to the plaintiff, to demand from the defendants the said sum of 4500*l*. above demanded. Breach, non-payment thereof.

The defendants pleaded, that they did not, at the time of serving the said notice in the said declaration first mention-

ed, or at any other time, take the said lands of the said plaintiff in the declaration mentioned, or any part thereof, modo et formâ; concluding to the country: and upon that plea issue was joined.

At the trial of the cause, before *Pollock*, C. B., at the Middlesex Sittings after last Hilary Term, it appeared that the action was brought by the plaintiff to recover the sum of 4500*l.* against the Company, as the value of three dwelling houses and premises situated in Birmingham, of which the plaintiff was the owner.

The defendants, in 1846, obtained an Act of Parliament, intituled "An Act for making a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester, and Wolverhampton Railways, to be called 'The Birmingham and Oxford Junction Railway,'" by which Act they were united into a Company for the purpose of making and maintaining such Railway, with proper works and conveniences, and for those purposes were incorporated by the name of "The Birmingham and Oxford Junction Railway Company," and by that name were declared to be a body corporate with perpetual succession, and power to purchase and hold lands for the purposes of the undertaking (a). Another Act passed on the same day, intituled "An Act for making a Railway into Birmingham in extension of the proposed Birmingham and Oxford Junction Railway." The latter Act, which was for the purpose of making a connecting line with the former line, contained the same powers of purchasing land; and by it the two undertakings were amalgamated, under the title of "The Birmingham and Oxford Junction Railway Company." By each of the preceding Acts, the Companies Clauses Consolidation Act, 8 Vict. c. 16, the Lands Clauses Consolidation Act, 8 Vict. c. 18, and the Railways Clauses Consolidation Act, 8 Vict. c. 20, were incorporated.

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY Co.

(a) Sect. 3.

1850.
BURLINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

On the 9th of January, 1847, the plaintiff received a notice from the defendants in the following form:—

“ Birmingham and Oxford Junction Railway.”

“ In pursuance of the Birmingham and Oxford Junction Railway Act, 1846, and the several Acts of Parliament incorporated therewith, I do hereby, on behalf of the Birmingham and Oxford Junction Railway Company, give you notice, that the said Railway will pass through messuages or tenements, workshops, outbuildings, yards, and entry, situated in the parish of Birmingham, in the county of Warwick, and numbered 140, 141, 142, and 143, on the plan and in the book of reference deposited in the office of the clerk of the peace for the county of Warwick, and which premises belong or are reputed to belong to you or some one of you, or in which you or some one of you have or claim to have some estate or interest. And I further give you notice, that the Birmingham and Oxford Junction Railway Company require to purchase and take the said premises for the purposes of the said Railway; and that the premises so required to be purchased and taken are coloured red upon the plan hereunto annexed; and that the said Company are willing to treat for the purchase thereof, and of all subsisting leases, term, estates, and interests therein, and as to the compensation to be made to all parties for the damage that may be sustained by them by reason of the execution of the said works. And the said Company do hereby demand from you and each of you the particulars of your estate and interest in the premises so required to be purchased and taken, and of the claims made by you in respect thereof, such particulars to be delivered at the office of the secretary of the said Company, No. 34, Bennett's Hill, Birmingham, not later than twenty-one days from the service of this notice. And the said Company do hereby demand and require of you to produce to the said secretary, at his office aforesaid, within twenty-one days from the service of

this notice, any lease or grant for a longer period than one year, under or in respect of which you have or claim to have any estate or interest in the premises so required to be purchased and taken.

"Dated this 7th day of January, 1847.

"JOHN WILLIAM KIRSHAW,
"Secretary to the said Company."

"To Mr. Richard Bates, Mrs. Bates, Mr. Charles Burkinshaw, and to all and every other person and persons whom it may concern:—

"Mr. Hornblower, of Birmingham, is the agent appointed by the Birmingham and Oxford Junction Railway Company to treat for the purchase of the property to which this notice relates."

Upon the receipt of this notice, the plaintiff delivered to the defendants particulars, as required thereby, stating the amount he claimed, as the value of the houses to be 4500*l.*, and he required the payment of that sum, or that the defendants should issue a warrant to summon a jury to assess the amount under the Act. No further step was taken by the Company in the matter.

Upon this state of facts, it was contended, on the part of the defendants, that the plaintiff's land had not been *taken*, within the meaning of the 68th section(a) of the Lands

Sect. 68 enacts, "That, if any party shall be entitled to any compensation in respect of any lands, or any interest therein, which shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters of the undertaking shall not have made satisfaction under the provisions of this or the special Act, or any Act incorporated therewith, and if the compensation claimed in such case

shall exceed the sum of 50*l.*, such party may have the same settled, either by arbitration or by the verdict of a jury, as he shall think fit; and if such party desire to have the same settled by arbitration, it shall be lawful for him to give notice in writing to the promoters of the undertaking of such his desire, stating in such notice the nature of the interests in such lands in respect of which he claims compensation, and the

1850.
BURKINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY CO.

Clauses Consolidation Act (8 Vict. c. 18). A verdict was thereupon entered for the plaintiff for the amount claimed, with leave to the defendants to move to set that verdict aside, and to enter a verdict for them.

Whateley obtained a rule nisi accordingly; and in the present Term (May 30)

Martin, Aspland, and T. Y. Lee, shewed cause.—The plaintiff is entitled to recover the amount he claims in this action, for the defendants have taken his land, according to the true construction of the 68th sect. of the 8 Vict. c. 18. The effect of the notice was to entitle the defendants absolutely to the land. The plaintiff had lost all power of disposing of it after the notice; and as the amount claimed by him as the value of the property was not disputed by the defendants, (for they did not take any further steps after giving the notice and receiving his claim,) they are liable for the full amount so demanded. By their silence they admit the amount to be correct. It is in the nature of a judgment by default. In *Rex v. The Hungerford Market Company*(a),

amount of compensation so claimed therein; and unless the promoters of the undertaking be willing to pay the amount of the compensation so claimed, and shall enter into a written agreement for that purpose within twenty-one days after the receipt of such notice from any party so entitled, the same shall be settled by arbitration, in manner herein provided; or if the party so entitled as aforesaid, desire to have such question of compensation settled by jury, it shall be lawful for him to give notice in writing of such his desire to the promoters of the undertaking, stating such particulars as aforesaid; and un-

less the promoters of the undertaking be willing to pay the amount of compensation so claimed, and enter into a written agreement for that purpose, they shall, within twenty-one days after the receipt of such notice, issue their warrant to the sheriff to summon a jury for settling the same in the manner herein provided; and in default thereof, they shall be liable to pay to the party so entitled as aforesaid, the amount of compensation so claimed, and the same may be recovered by him, with costs, by action in any of the superior Courts."

(a) 4 B. & Ad. 327.

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY CO.

where the defendants were empowered under their Act, 11 Geo. 4, c. lxx., to purchase certain premises, and, by the 6th section, if the person interested in the premises should, for twenty-one days next after the notice given him by the Company, refuse to treat, or not agree for the sale of them, in all such cases the Company were to cause the value of and recompense to be made for such premises to be ascertained by a jury; and it was there held, that the notice was binding upon the Company, and that they were not entitled to withdraw from it even on payment of all reasonable costs incurred by the occupier of the land in consequence of the notice. And in a similar case, of *Salmon v. Randall(a)*, Lord Cottenham said, "The parties, I conceive, are put into the situation of vendor and purchaser by the notice; and, like every other vendor and purchaser, they must of course complete their purchase according to the provisions, not of the contract, but of those arrangements which the Act of Parliament has substituted in lieu of the contract in a case where no contract can take place." So, in the present case, the statute makes a complete contract between the owner of the property and the Company upon the giving of the notice. It is not necessary that there should have been an entry upon the land: the notice, in effect, constitutes a taking within the meaning of the 68th section. The statute does not speak of a notice to take; and the 84th section uses the word "enter," which is an argument against that construction by which it will be contended that the taking must be by entry or some equivalent act. From the 16th to the 68th sections the enactments taken together constitute a code under which a compulsory contract is created by the statute. A new code commences with the 69th section, coming under a different and distinct heading. In *Stamps v. Birmingham and Stour Valley Railway Company(b)*, Lord Cottenham says, "I have decided,

(a) 3 My. & Cr. 449.

(b) 17 L. J., C. C., 435.

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY CO.

and decided generally in all cases where the question has arisen, that, where a Company gives notice to purchase, and where they have described the quantity of land that they require, by that means they enter into a contract with the landowner to make the purchase, and that, therefore, they cannot afterwards depart from it; they cannot say, I have agreed with you to purchase two acres of your land, but I now find that we do not require it, and I give you notice that I mean only to purchase one acre." And in *Eaton v. Midland Great Western Railway Company* (a), where the owner of the property received a notice from a Railway Company, and he replied to the notice by stating his title to the lands and the amount he claimed, and the Company neither referred the matter to arbitration, nor summoned a jury to decide it—it was held that the statute in question gave the owner of the property a right of action for the amount claimed. They also referred to *Walker v. Eastern Counties Railway Company* (b), *Regina v. The Commissioners of Woods and Forests* (c), *Corrigal v. London and Blackwall Railway Company* (d), *Ramsden v. Manchester and South Junction Railway Company* (e), *Doe d. Hutchinson v. Manchester, Bury, and Rossendale Railway Company* (f), and *Rex v. Nottingham Old Water Works Company* (g).

Whateley and *F. Robinson*, in support of the rule.—The question is, whether the defendants, by the mere fact of having given the plaintiff notice that they will take his land, are to be considered as having *taken* that land within the true meaning of the 68th section. If the Act had cast the duty upon the *Company* of issuing a precept to summon the jury, and of performing the various matters in order to

(a) 10 Ir. Rep. 310.
 (b) 5 Railw. Cas. 469.
 (c) 17 L. J., Q. B., 341.
 (d) 5 M. & Gr. 219.

(e) 1 Exch. 723.
 (f) 14 M. & W. 687.
 (g) 6 A. & E. 356.

ascertain the value of the land within the period of twenty-one days, the argument on the part of the plaintiff, that the Company are to be considered as bound to pay the price set upon the property by the plaintiff, might have some weight; but there is no provision in the Act by which the Company are required to perform all these matters. The 68th section requires that there should be an *actual* taking of possession, or some other act done by which the land is injuriously affected. The defendants admit that by the notice they have rendered themselves liable to take the land, and perhaps in equity they may be held to have taken it; and the authorities cited may lead to that conclusion. There may be a statutory *contract to take*, but there has not been a *taking* within the 68th section. That section does not provide for the same kind of compensation as has already been provided for by the preceding sections. The sections which precede the 68th apply to the constructive taking; and then comes the 68th, which provides for the actual taking of, or an injury done to, the land. According to the plaintiff's view of the meaning of the 68th section, the actual construction of a bridge upon his land would not be within that section. This notice amounts to a mere *notice* to take the land within the 18th section. In *Eaton v. Midland Great Western Railway Company*, it appeared upon the face of the declaration that there had been an entry by the Company upon the land.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a motion to enter a verdict in this case for the defendants; and the question raised at the trial, and argued by Mr. *Martin* for the plaintiff, and Mr. *Whateley* for the defendants, is a very important one. The plaintiff is the proprietor of three houses, which were included in the property liable to be taken by the defend-

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY CO.

1850.
BURKINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

ants under their Act for making a Railway. In pursuance of the powers contained in the Act 8 Vict. c. 18, s. 18, notice was, on the 9th day of January, 1847, given by the promoters of the undertaking to the plaintiff, that his property would be required by them for it; and by the notice they demanded of him the particulars of his interest therein, and stated their willingness to treat with him for the purchase of the same. These particulars were duly furnished, and a value, 4500*l.*, put on the property by the plaintiff, which amount he claimed from the promoters, as a compensation for taking these premises. He required payment of this amount, or that a warrant should be issued by the Company to summon a jury to assess the proper amount, under the provisions of the Act. The Company neglected for twenty-one days and upwards to do either, and the question is, whether the plaintiff, upon these facts, can maintain an action, and recover as damages the amount of 4500*l.* so claimed by him. And this depends upon the construction to be put by the Court on the 68th section of the 8 Vict. c. 18.

By that section, when lands shall have been taken for, or injuriously affected by, the execution of the works, and for which the promoters shall not have made any compensation, a party claiming a compensation exceeding 50*l.* may have it settled by arbitration, or by a jury; and if he selects, as he has done here, a jury, the promoters are bound to summon one in twenty-one days, and in default thereof are made liable to pay the party so entitled the amount of the compensation so claimed, and the same may be recovered by action, with costs, in any of the superior Courts.

Now, the question here is, what is the meaning of the words "lands taken for the execution of the works;" for it is to such lands alone that the clause applies. It has been determined on several occasions by Lord *Cottenham*, and, independently of his high authority, we entirely concur in that opinion, that where a Company, as here, give notice to

1850.

BURKINSHAW
v.
BIRMINGHAM
AND OXFORD
JUNCTION
RAILWAY CO.

a party that they require his lands for their works, it amounts to an agreement by them for the purchase of those lands, assented to by the opposite party, on the terms of making the compensation in the way appointed by the Act under which such notice is given, and binds both parties finally. In some sense therefore, lands, upon such notice being given, may be described as lands taken for the execution of the works. And so, in one case, the Court of Queen's Bench called them, and we think correctly. But the point is, whether the "lands taken" in the 68th section mean lands actually taken into the possession of the Company, and those alone. And, after carefully considering the various clauses of the Act preceding the 68th section, we have arrived at the conclusion, that this is the correct construction. The whole of this part of the Act, beginning at the 16th section and ending at the 68th inclusive, seems to us to form, so to speak, one code on this subject, and to provide successively for all the various cases that were likely to occur. It is preceded by this preamble—"And, with respect to the taking and purchase of lands otherwise than by agreement, be it enacted:" then follow the 16th and 17th sections, providing when those powers may be put in force. And then follows the 18th, as to giving notice of the lands required, and the compulsory treating for the same in case the notice does not lead to an agreement without further dispute; the disputed claims, if any, under 50*l*., are settled by the 22nd and 24th sections, by the determination of two justices, in all cases. If the compensation exceeds 50*l*., then, by the 23rd section, an option is given to the party claiming to have an arbitration, and if this be adopted it is to be carried into effect by the sections beginning at the 25th and ending at the 37th inclusive. Then begin the clauses as to the settlement of the dispute by the verdict of a jury, where the party claiming appears. Those end with the 57th section. The 58th to the 67th then follow, as to the assessment of the value of the land comprised in the notice

1850.
 BURKINSHAW
 v.
 BIRMINGHAM
 AND OXFORD
 JUNCTION
 RAILWAY CO.

in the case of owners who are absent. This is to be done by a surveyor duly appointed, with a limited power of subsequent arbitration or assessment by a jury, if required by the absent party. Now, these provisions really exhaust the whole of the cases in which the Company give notice of requiring the lands of the owners adversely, where the Company requiring those are not in possession of the lands, and can only obtain that possession upon payment of the ascertained compensation. But another class might exist, and require to be provided for, in which the above provisions could not be applied, and that was the class where the Company had been permitted to take possession, without any distinct agreement for compensation, or where, in the execution of their works, injury not originally in the contemplation either of the Company or of the owners, was actually incurred. And the literal meaning of the words, land which shall have been taken, or shall have been injuriously affected—not land which *shall be* taken or *shall be* injuriously affected,—clearly, we think, points to this class alone. Independently, therefore, of the argument, not an unimportant one, that the construction contended for by Mr. *Martin* would not give full effect to both the 23rd and 68th sections, but make them in some degree inconsistent, we have come to the conclusion, that, upon the true construction of the 68th section, the words “land taken, &c.” include lands only actually taken or actually affected by the Company, and consequently that, these lands not having been so taken, this action cannot be sustained against the defendants.

The result is, therefore, that the rule must be made absolute.

Rule absolute.

1850.

BROWNRIGG, MILLER, and BROWN, v. RAE, Public
Officer of THE NORTH AND SOUTH WALES BANK.

June 3.

THIS was an action on promises, for money lent by the plaintiffs to the North and South Wales Bank, received for their use by the bank, and due to them from the bank for interest and on an account stated. The defendant pleaded (*inter alia*) that the bank did not promise, and a set-off. The cause was tried before *Coleridge, J.*, at the Liverpool Spring Assizes, 1849, when a verdict was found for the plaintiffs, damages 10,000*L.*, subject to the opinion of the Court on the following case:—

In January, 1845, the plaintiffs became partners in business as merchants, under the firm of Brownrigg, Miller, & Co. In August, 1846, Brownrigg opened, in the name of the partnership firm, an account with the North and South Wales Bank, of whom the defendant is the registered public officer. (The case then set out the pass-book, the first item being dated 21st August, 1846, and the last 30th June, 1847; it was headed "The North and South Wales Bank, Liverpool, in account with Messrs. Brownrigg, Miller, & Co., Liverpool," and shewed a balance in their favour of 4,876*L.* 12*s.* 8*d.*, and interest, 29*L.* 18*s.* 7*d.*). This action was brought to recover the balance of 4876*L.* 12*s.* 8*d.*, with interest. At the trial, the defendant proved a set-off to the amount of 2,157*L.* 4*s.* 4*d.* upon a bill of exchange dated the 2nd August, 1847, payable two months after date to the order of Brownrigg, Miller, & Co, and by them indorsed to the North and South Wales Bank, and dishonoured, of which the indorsees had due notice. The

B., a partner in the firm of B., M., & Co., opened an account with certain bankers in the partnership name. B. was one of the commissioners under an Act of Parliament for paving, &c., a township, who also had an account at the same bank, and were considerably in advance. The commissioners being desirous of a further advance, the manager of the bank wrote to B., offering to make it, on condition that he would not withdraw an equal amount of his account. B. wrote in reply, that he wished to have 5000*L.* advanced on those terms, adding, "I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by the commissioners." The bank

made the advance, and subsequently there was a balance on B.'s account of 4876*L.*: the extra advance not having been paid:—*Held*, that, assuming that this was a partnership account, B., M., & Co. could not recover the balance as money received for their use; and that this defence was available under the general issue.

1850.
BROWNRIGG
v.
RAE.

defence rests on the following circumstances:—In December, 1846, and from thence continually, the Commissioners acting under an Act of Parliament of the 3 Will. 4, intituled “An Act for paving, lighting, watching, cleansing, and otherwise improving the township or chapelry of Birkenhead, in the County Palatine of Chester,” &c., and under subsequent amending Acts, had an open account, which had existed for several years, with the North and South Wales Bank. On the 29th December, 1846, the balance on this account against the Commissioners amounted to 56,906*l.* 6*s.* 9*d.* and the bank then and ever since held as security for its advances seven mortgage bonds of the Commissioners, for sums amounting in the whole to 50,000*l.* On the 29th December, 1846, the Commissioners desired a further advance. Brownrigg was then one of the Commissioners, and Chairman of their Finance Committee. On that day, Rae, the general manager of the Bank, wrote and sent the following letter to Brownrigg:—

“29th December, 1846.

“Dear Sir—Mr. Griffith informs me, that the Commissioners of Birkenhead will require some thousands this week, in addition to our present advances to them, but that this extra advance will only be required for about ten days, and that, on condition of our making it, you will place an equal amount to the credit of your private account, and will not withdraw it until the advance in question has been repaid. If you will inform me, as nearly as you can, the actual amount that will be required, and when, I will at once open a credit for the amount at our Birkenhead Branch.

“Faithfully your’s,

“GEO. RAE, General Manager.”

To this letter Brownrigg, on the same day, wrote and sent to Rae the following answer:—

“Liverpool, 29th December, 1846.

“Dear Sir—The payment for interest on bonds and cur-

1850.
 BROWNRIGG
 v.
 RAB.

ment expenses the Commissioners have to meet in the next few days amount to about 7300*l*.; against this, 1400*l*. has already been paid in, and I look for another 1000*l*. in the course of to-morrow or the day following. This will leave, say in round numbers, 5000*l*. unprovided for, and which I wish to have advanced by your bank, on the understanding mentioned by Mr. Griffiths: by private account, I conclude he meant my commercial account. I would not wish it to be distinctly understood that the advance is strictly confined to ten days, as the source from whence I look for relief is not to be relied upon to a week or so; but be this as it may, I undertake not to remove my funds to the extent of this extra advance until the same is repaid by the Commissioners.

“Yours faithfully,

“MARCUS F. BROWNRIGG.”

Brownrigg had no other account, and the account referred to in the above letters was the account opened by him in the name of the firm as aforesaid. On the receipt of the above letter the advance of 5000*l*. was made by the bank to the Commissioners, on the 31st December, 1846. On the 29th December, 1846, the balance against the Commissioners was 56,906*l*. 6*s*. 9*d*.; and at the commencement of this action (25th November, 1848), it amounted to 70,775*l*. 1*s*. 6*d*. [The case then stated numerous facts, for the purpose of shewing that the account was the private account of Brownrigg.]

The question for the opinion of the Court was, whether the plaintiffs were entitled to recover in this action the difference between the balance of their account with the North and South Wales Bank, appearing by the said pass-book, with interest, and the amount of the set-off on the bill of exchange for 2157*l*. 4*s*. 4*d*., with interest. If the Court should consider the plaintiffs so entitled, the verdict was to stand, but the amount to be reduced to 2783*l*. 14*s*., with interest thereon at five per cent.; if the Court should consider the plaintiffs not so entitled, then a nonsuit to be entered.

1850.
BROWN RIGG
v.
RAE.

J. Henderson, for the plaintiffs—The plaintiffs are entitled to recover, unless they are affected by the transaction of the 29th December, 1846. The pass-book made out by the bankers proves that they were the bankers of Brownrigg, Miller, & Co. The whole account was in the name of the firm, and there was no separate account in Brownrigg's name. Therefore the case is distinguishable from *Sims v. Bond (a)*, where the managing owner of a vessel, having been permitted by the other owners to have possession of two East India warrants for payment to the owners of a certain sum for freight, deposited these warrants in the hands of his bankers, and they received the money due on them, and gave him credit for it in account; and it was held that the other owners could not, after the death of the managing owner, recover the money, because it was not shewn that the loan was on their account. Here the bankers have, as it were, attorned to the persons representing the firm of Brownrigg, Miller, & Co. The question then is, whether the facts proved by the defendant shew a defence valid in law. Now, the agreement of the 29th December, 1849, in terms professes to be the agreement of Brownrigg alone; and even if it had assumed to bind the partnership, it could not do so, because, to the knowledge of both parties, the transaction was manifestly out of the course of the partnership business. If indeed this had been a mercantile contract signed by Brownrigg in the name of the firm, it would, in the absence of fraud, have bound the firm: *Ridley v. Taylor (b)*; but even such a contract, if signed by him in his own name, would have bound him alone: *Siffkin v. Walker (c)*. Suppose the funds had not been placed in the hands of the bankers, could they have sued the partnership for a breach of contract? Then, treating this as the agreement of Brownrigg, that the partnership funds should be deposited as a security for extra advances, there was no legal obligation on the other part-

(a) 5 B. & Ad. 389.

(b) 13 East, 175.

(c) 2 Camp. 307.

ners to allow them to remain, for the latter neither authorised nor ratified the agreement. Both in form and effect this is the agreement of Brownrigg alone, and whatever liability to damages might devolve on him by reason of his failure or inability to perform his contract, the rights of all the partners to the partnership funds remained unchanged. If Brownrigg had by deed covenanted that the funds should not be withdrawn until the advances were repaid, that would have been no defence. A covenant, not to sue for any debt due to the covenantor, cannot be pleaded as a release in bar of an action by the covenantor and another person for a debt due to them jointly: *Walmsley v. Cooper* (a). So if the obligee of a bond covenant not to sue one of two joint and several obligors, and that if he do, the covenant may be pleaded in bar, he may nevertheless sue the other obligor: *Dean v. Newhall* (b). If the other partners had died, Brownrigg surviving, he might have maintained the action. The distinction is well established between a covenant which operates in discharge of a debt, and one which only creates a counter-right to damages: *Thimbleby v. Barron* (c), *Deux v. Jefferies* (d), *Aloff v. Scrimshaw* (e). That proceeds on the doctrine, that a personal action once suspended by the act of the party is gone for ever, therefore the covenant must either operate as an absolute discharge, or a mere covenant.

But assuming this to be a good defence, it is not available under the plea of non assumpsit. The money sought to be recovered is part of the balance due to Brownrigg, Miller, & Co. at the time when the bankers made the advances, and therefore was money lent to or received by them for the use of the firm; and if the subsequent advances gave them a right to retain it until the advances were repaid, that should have been pleaded specially.

(a) 11 A. & E. 216.

(b) 8 T. R. 168.

(c) 3 M. & W. 210.

(d) Cro. Eliz. 352.

(e) 2 Salk 571.

1850.
BROWN RIGG
v.
R.A.R.

Crompton, for the defendant.—It was competent for Brownrigg to bind the partnership funds by this agreement. A pledge of partnership property by one partner, without fraud or collusion on the part of the pawnee, passes to him the whole partnership interest: *Reid v. Hollingshead* (a). Brownrigg could not sue alone, repudiating his own agreement; and if so, he cannot recover by joining other parties to rescind his own act. That principle was recognised and established in *Wallace v. Kelsall* (b), where, to an action by three plaintiffs for a joint demand, the defendant pleaded an accord and satisfaction with one of the plaintiffs, by a part-payment in cash and a set-off of a debt due from that one to the defendant; and the plea was held good, without alleging any authority from the other two plaintiffs to make the settlement. In *Richmond v. Heapy* (c), where one of three partners undertook to provide for two bills of exchange drawn by the three partners, and accepted by a fourth person, it was held that such acceptances would not support a commission of bankruptcy against the acceptor on the petition of the three partners, although the conduct of the one partner might, as against his co-partners, have been fraudulent. And in *Jones v. Yates* (d), it was held that, even where the indorsement of a bill of exchange by one of two partners was a fraud upon the other, the two partners could not maintain trover for the bill. Lord Tenterden, in delivering the judgment of the Court, said:—"We are not aware of any instance in which a person has been allowed, as a plaintiff in a Court of law, to rescind his own act, on the ground that such act was a fraud on some other person, whether the party seeking to do this has sued in his own name only, or jointly with such other person." In *Sparrow v. Chisman* (e), one of several partners in a banking-house drew a bill in his own name upon a third party, who accepted the same, upon

(a) 4 B. & C. 867.

(b) 7 M. & W. 264.

(c) 1 Stark. N. P. C. 202.

(d) 9 B. & C. 532.

(e) 9 B. & C. 241.

condition that the drawer should provide for it when due; and it was held that the drawer could not, either alone or jointly with the other partners, sue the acceptor. *Gordon v. Ellis* (a) is also an authority in favour of the proposition contended for.

1850.
BROWN RIGG
v.
RAB.

And this defence is open under the plea of non assumpsit. The sum received by the bank, in pursuance of the agreement of the 29th December, 1846, was not money received on a contract to be repaid *on request*, but subject to an agreement that the money should remain as a security for the extra advance. Therefore a special plea would have been bad, as purporting to confess and avoid, but in fact denying that the money was received for the use of the plaintiffs.

Henderson, in reply, cited *Collyer on Partnership*, p. 279.

POLLOCK, C. B.—We are all agreed that a nonsuit must be entered. The case contains several facts, as to which it seems to me that some persons might come to one conclusion, and others to another; and if the case depended on them, I should say the decision of it was a duty which ought not to be cast on us. But my reason for thinking that a nonsuit must be entered is, that the plaintiffs have not made out their title to recover this money. The account was opened by Brownrigg in the name of Brownrigg, Miller, & Co.; and the conclusion to be drawn from the facts is, that the account was the account of the one individual, carried on in the name of the firm. Brownrigg, by his letter of the 29th December, 1846, in effect says:—"I have an account which you call my private account, by which, I suppose, you mean my commercial account;" thus apparently assuming that this was his commercial account as distinct from his private account. Under those circumstances he makes this agreement:—"I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by

(a) 7 M. & G. 607.

1850.
 BROWNIGG
 v.
 RAE.

the Commissioners." That is an undertaking not to draw, so as to reduce the balance of 5000*l*. It is in substance this:—"You are my bankers, and have 5000*l* of my money in your hands, and if you will allow the balance of the Commissioners to be increased by 5000*l*, I undertake not to withdraw my balance so as to reduce it below that amount." Consequently he had a right to draw only for the surplus above 5000*l*. Therefore it appears to me that the defence is open under the general issue; for this is not money had and received for the use of the plaintiffs, but money had and received on an express undertaking, which has been violated by bringing this action.

ALDERSON, B.—Looking at the arrangement, the case appears to me clear. The agreement of Brownrigg is to be derived from the two letters of the 29th December, 1846. The one from Rae contains a proposal to make an extra advance to the Birkenhead Commissioners, on condition that Brownrigg would place an equal amount to the credit of his account, and would not withdraw it until the advance was repaid. Brownrigg in reply says:—"I wish an advance of 5000*l*, and I undertake not to remove my funds to the extent of this extra advance until the same is repaid by the Commissioners." That is an agreement not to reduce his balance below 5000*l*. Then, whatever sums were paid in after that time were paid subject to that arrangement; therefore, the contract is not to pay the balance due *on request*, but only to pay the excess of 5000*l*; and if the partners claim the money, they must claim it under the contract of Brownrigg, and cannot substitute another and a different contract. It seems to me that the defence is open under the general issue, since the bankers never made a contract to pay on request, because it does not appear that they were ever repaid the extra advance.

ROLFE, B.—I am of the same opinion. It is admitted that the plaintiffs, who are a firm, trading under the name of Brownrigg, Miller, & Co., are entitled to recover, unless

the circumstances relied on as a defence preclude them. Now, the account was opened by Brownrigg in the name of Brownrigg, Miller, & Co. ; and upon the facts stated, it is left to my mind uncertain whether the bank understood that Brownrigg was the sole person interested in the account, or merely as a partner in the firm of Brownrigg, Miller, & Co. If the merits of the case had turned on that, I should have concurred with my Lord in saying that the duty of deciding it ought not to be cast on us ; but I have come to the conclusion that it is immaterial to the decision of this case. I will assume that the bank knew that Brownrigg was not the sole member of the firm ; then how does the matter stand ? There is a fund in the hands of the bank, belonging to the firm of Brownrigg, Miller, & Co., and which Brownrigg had been actually dealing with as his own. Then the bank say, we will not advance any more money to the Commissioners, unless you will undertake not to remove your funds to the extent of the extra advance until the same is repaid. The question is, what is the undertaking which Brownrigg entered into. Mr. *Henderson* argued very ingeniously that this was no contract to secure one fund by another, but only a contract that the account should not be drawn under 5000*l*. Assuming that to be so, it means that all monies so received shall be received, in the first place, as a security that the account shall always be to the credit of the bank to the extent of 5000*l*, and then to the ordinary purposes of the firm. It is said that Brownrigg had no right to pledge the money of the firm ; but, having done so, he cannot turn round and repudiate his own act. If a partner, in violation of his duty as partner, pledges the partnership funds, it would be strange if he were allowed to say, "I was wrong in dealing with the partnership funds, and therefore I seek to undo what I have done." Here it is not necessary to go that length, because there is nothing to prevent the operation of the general rule, deducible from

1850.
BROWNRIGG
v.
RAE.

1850.
BROWNRIFF
v.
RAE

Buddock's case (a), and the other cases which have followed it, and which were cited in the argument. On these grounds, it appears to me clear that an action for money had and received will not lie, unless it is shewn that the money advanced to the Commissioners has been repaid; and that, whether the account was the account of Brownrigg alone or of the partnership firm, the plaintiffs are not entitled to recover.

PLATT, B., concurred.

Judgment of nonsuit.

(a) 6 Rep. 25 a.

May 22.

DOE d. BAKER and Others v. JONES.

The receipt of rent is no waiver of a continuing breach of covenant. Therefore, where a lessee was bound, under penalty of forfeiture, to repair within a reasonable time, and after breach the lessor accepted rent:—*Held*, that the reasonable time for reparation did not commence afresh after such acceptance of rent.

THIS was an action of ejectment to recover the possession of certain premises, situate in Chapel-street, Edgeware-road, on a forfeiture by breach of covenant in not repairing. The cause came on for trial before *Pollock*, C. B., at the Middlesex Sittings after Michaelmas Term, 1848; when a verdict was taken by consent for the lessors of the plaintiff, subject to the award of an arbitrator, to whom the cause, and all matters in difference between the said parties and one R. Darch, who agreed to become a party to the submission, were referred. The arbitrator awarded (*inter alia*) as follows:—"I find that, by a building lease, being an indenture dated the 1st of July, 1803, and made between J. Buck, of the first part; J. Stephens and D. Bullock, of the second part; J. Ward, of the third part; J. Walton, of the fourth part; and E. Welch, of the fifth part; the said parties of the first, second, third, and fourth parts, did demise to the said E. Welch the land sought to be recovered in this action, for 99 years, from Christmas, 1792, at the rent therein mentioned; and if the lessees should at any time use the premises, or any part thereof, for any manufactory save as a floorcloth manufactory as then used, or for any trade

or business whatsoever, without the licence in writing under the hands of the lessors, then yielding and paying, for the residue then to come of the said term, over and above the rent thereinbefore reserved, the monthly rent of 50*l*. The lease contained a covenant by the lessee, for himself and his assigns, that he and his assigns would, at their own cost and charges, well and sufficiently repair, uphold, support, sustain, maintain, tile, slate, lead, paint, pave, purge, scour, cleanse, empty, amend, and keep the same premises, and every part thereof, with all and all manner of needful and necessary reparations and amendments whatsoever, when and so often as need or occasion should require, during all the said term; and a proviso, that in case of breach or non-performance or non-observance of any of the covenants, clauses, or agreements in the lease, the lessors might enter and put an end to the term. I find that the reversion in fee, expectant on the termination of the said term, became vested in the lessors of the plaintiff prior to September, 1846, and has so continued vested to the present time. In that month one R. Darch, who proposed to become tenant of the premises, went over them with R. Cantwell, a surveyor, on behalf of the lessors of the plaintiff, and pointed out to him certain alterations he wished to make therein, which consisted in moving certain outbuildings, and making excavations for saw-pits and veneer-pits. On the 12th of October, 1846, the lessors of the plaintiff signed a memorandum, directed to J. Welch, or other the tenants of the premises, whereby they gave full licence and authority to carry on the trade or business of a timber-merchant on the premises, adding the words, "provided that any alterations therein or thereto be made to the satisfaction of our surveyor, Mr. Robert Cantwell, testified by writing under his hand." On the 18th of March, 1847, the residue of the term was assigned to the defendant, D. Jones, and on the 3rd of April in that year he paid the rent due under the lease up to the 25th of the pre-

1850.

Don
d.
BAKER
v.
JONES.

1850.

DOE
d.
BAKER
v.
JONES.

ceding March. For a long time before and at the time of this payment, the whole of the premises were out of repair, owing to the neglect of the lessees to perform their covenant to repair. Part of the outbuildings, consisting of a shed, stable, and cow-house, were in such a state of dilapidation that they could not be repaired, and it was necessary that they should be taken down and rebuilt. Shortly after this payment of the rent, R. Darch, who at that time had become tenant of the premises under the defendant, D. Jones, proceeded to (and in fact did) pull down all the last-mentioned out-buildings, and made certain excavations in a yard, part of the ground demised. He so acted with a bonâ fide intention of re-erecting the out-buildings, and also intended to use part of the space excavated as saw-pits, and the rest for veneer-pits, both required in his trade of a timber merchant. On the 21st of October, 1847, the declaration in ejectment was served. At this time, the principal building, formerly used as a floor-cloth manufactory, had not been properly repaired, part of the out-buildings had been re-erected, and part had not been re-built, and the excavation before mentioned was in progress. Immediately after the service of the declaration in ejectment, the excavation was stayed, and the pit that had been dug was filled up. Upon this state of facts, it was contended by the lessors of the plaintiff, that a breach of covenant had been committed in pulling down the out-buildings, in general neglect to repair, and in making the excavations. On the part of the defendant it was contended, that the lease was to be considered as subsisting on the 25th of March, 1847, in consequence of the receipt of the rent up to that day; and that, looking at the state of the premises at that time, the lessee was to be allowed a reasonable time to pull down and rebuild the out-buildings, and generally to repair the whole premises. And as to the excavations, the defendant contended, that he was justified in making them by virtue of the lease, and under the circumstances stated. For the

purposes of disposing of the action of ejectment, I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessees were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine, that it was the duty of the lessee, from time to time, to repair the premises pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required. And I also award and determine, that the lessors of the plaintiff had a right to re-enter on the day the declaration in ejectment was served, and that the verdict found by the jury is to stand."

A rule had been obtained, calling on the lessors of the plaintiff to shew cause why the award should not be referred back to the arbitrator, as far as it related to the action of ejectment; against which rule—

Martin and Cowling now shewed cause.—The arbitrator has rightly decided that there was a breach of the covenant to repair, and consequently the lessors of the plaintiff are entitled to recover for a forfeiture. The receipt of rent, no doubt, affirmed the tenancy up to the time the rent became due, but there is no authority to shew that it operated as an extension of the time for repairing. The principle established in *Arnsby v. Woodward* (a), namely, that the receipt of rent by a landlord destroys his right to proceed for a forfeiture previously committed, does not apply here, for the non-repair of the premises was a continuing breach, which entitled the landlord to re-enter: *Doe d. Ambler v. Woodbridge* (b), 1 *Wms. Saund.* 288. In *Doe d. Flower v. Peck* (c), it was held, that though a distress for rent, made on the 30th September, was a waiver of any forfeiture up to that time, yet the lessor of the plaintiff was entitled to recover in ejectment, for a continuing breach of

1850.

DOE
d.
BAKER
v.
JONES.

(a) 6 B. & C. 519. (b) 9 B. & C. 376. (c) 1 B. & Ad. 428.

1850.

DOE
d.
BAKER
v.
JONES.

covenant in not insuring after the 30th September. *Doe d. Muston v. Gladwin* (a) also shews, that a waiver of forfeiture by the acceptance of rent is confined to the period when the rent was received. A lessor has a right to have the premises kept in repair at all times during the term: *Luxmore v. Robson* (b); and a reasonable time for repairing does not commence afresh after each act of waiver, but the time continues running. It would have been no answer to an action of covenant, to plead that the plaintiff authorised the defendant to leave the premises out of repair, for a covenant cannot be discharged by a parol licence: *Roe d. Gregson v. Harrison* (c).

Hayes, in support of the rule.—The receipt of rent operates as an affirmance of the tenancy, and therefore an action of covenant may be maintained, though ejectment will not lie. A tenancy may be affirmed, not only in respect of past breaches, but also prospectively. Thus, where a lease contained covenants to keep the premises in repair, and also to repair within three months after notice, and the premises being out of repair, the landlord gave a notice to repair within three months, that was held a waiver of the forfeiture incurred by breach of the general covenant to keep the premises in repair, and that the landlord could not bring ejectment until after the expiration of the three months: *Doe d. Morecraft v. Meux* (d). *Bayley, J.*, in delivering judgment, distinguishes that case from *Roe d. Goatly v. Paine* (e), where the tenant was required to put the premises in repair *forthwith*. *Doe d. De Rutzen v. Lewis* (f) proceeded on the same principle. There the lease contained a general covenant to repair, and a further covenant that the lessor might give notice of want of repair, and if the lessee did not repair within two months, the lessor might re-enter and do the repairs himself, the ex-

(a) 6 Q. B. 953.

(d) 4 B. & C. 606.

(b) 6 B. & A. 584.

(e) 2 Camp. 520.

(c) 2 T. R. 425.

(f) 5 A. & E. 277.

pense of which the lessee was to repay at the time of paying his next rent, and if he did not do so the lessor might distrain on him for the expense as in case of rent in arrear. There was also a power of re-entry for breach of any covenant. The premises being out of repair, the lessor gave the lessee notice to repair within six months, and that if he did not repair within that time, the lessor would perform the repairs and charge him with the expense. The premises were not repaired within the six months. During that time a negotiation was entered into between the lessor and lessee; and after the expiration of the six months the lessor gave the lessee notice, that if he did not agree to certain terms in three days, the lessor would hold him to the covenants in the lease. The lessee did not agree; and under these circumstances it was held that the lessor could not recover in ejectment for a forfeiture, he having elected to perform the repairs and distrain for the expense, and the general power to re-enter not being revived by the three days notice. So here the plaintiff, having given a licence to the defendant to make extensive alterations on the premises, cannot bring ejectment before they are completed, for the licence is in effect a declaration by the plaintiff, that the defendant shall continue as tenant while the alterations are going on. By the acceptance of rent the lease was affirmed up to the 25th of March, 1847; and there is no forfeiture unless there was a new breach after that time. [*Alderson*, B. —Suppose the arbitrator had found that twelve weeks was a reasonable time for repairing, and that ten weeks had elapsed when the rent was received, would the defendant have two or twelve weeks more?] The past neglect would be waived, and there would be no breach until a subsequent neglect to repair within a reasonable time. The acceptance of rent bars the entry, because it shews the lessor's intent and election to have the lease continue: *Marsh v. Curteys* (a). —He also referred to *Doe d. Darlington v. Ulph* (b).

1850.
Doe
d.
BAKER
v.
JONES.

(a) Cro. Eliz. 528.

(b) 18 L. J., Q. B., 106.

1850.

DOE
d.
BAKER
v.
JONES.

POLLOCK, C. B.—The rule must be discharged. The question is, whether the action of ejectment is properly disposed of by this finding—"I do award and determine, that, looking at the state of the premises on the 25th of March, 1847, if the lessee were entitled by law to a reasonable time from that day to put the premises in repair, such reasonable time had not elapsed when the declaration in ejectment was served. But I award and determine that it was the duty of the lessee from time to time to repair the premises, pursuant to the covenant, and that any reasonable time for so repairing must date from the time each particular reparation was required." That appears to me to be the correct rule of law, and we cannot lay it down that a new time for reparation commences after each receipt of rent. There may be a considerable distinction between the case of an actual breach before the receipt of rent, the reasonable time having elapsed, and where the reasonable time is still running, because in the latter case there is no breach to waive, but in the former there is some ground for saying that the acceptance of rent is a waiver of the forfeiture actually incurred. However, I do not mean to express an opinion in favour of the proposition which Mr. *Hayes* has contended for, and, I must own, not without some shew of reason; it is sufficient to say, that, upon the present award and finding, the question must be decided in favour of the lessors of the plaintiff, unless, as a matter of law, the lessees were entitled to a reasonable time for reparation after the rent received became due, which I think they were not.

ALDERSON, B.—I do not feel the same difficulty as the Lord Chief Baron. The receipt of rent is a waiver of all forfeitures, which are, so to speak, single and complete, and are not in the nature of continuing forfeitures. So with respect to continuing forfeitures, where the lessee is bound from time to time to keep the premises in repair, and he omits for an unreasonable time, but afterwards repairs them, there

the receipt of rent waives the previous forfeiture. But where the matter is plainly a continuing breach, the only question is, whether, when the party seeks to re-enter, the premises have been an unreasonable time out of repair and so continue.

1850.

DOE
d.
BAKER
v.
JONES.

ROLFE, B.—I am of the same opinion. If, instead of “a reasonable time,” the lease had named five days, within which the lessee was to repair, there could have been no difficulty, because the five days had elapsed on the 25th March, 1847: the receipt of rent would have been a waiver of the actual breach, but it would have been no waiver of a neglect to repair between the 21st and 25th, for then there was no complete breach.

PLATT, B.—It is a fallacy to say that the receipt of rent was a waiver of the breach of contract to repair, for it was a continuing breach, and until the repairs were perfected, the lessors of the plaintiff were entitled to re-enter for the forfeiture.

Rule discharged.

1850.

June 3.

TOWNEND v. WOODRUFF and Others.

A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods.

Trespass for taking the plaintiff's goods, to wit, potatoes, baskets, &c. Pleas, first, that W. was possessed of a close, called May Day Green, and because the goods were wrongfully upon the close, incumbering the same, the defendants, as the servants of W., took the goods

and removed them;—secondly, that T. was possessed of a close, part of land called May Day Green, and because the goods were wrongfully upon the last-mentioned close, incumbering the same, the defendants, as the servants of T., removed them. Replication to first plea, that a market was held upon the close in which &c., for the buying and selling provisions, and the plaintiff brought into the close in which &c., into the market, the potatoes, for the purpose of selling the same, and also then brought the baskets, being necessary and proper for holding and containing the same, being no inconvenience to the holding of the market, when the defendants of their own wrong seized them. The replication to the second plea was in similar terms. Rejoinder to replication to first plea—That A., being seized in fee of the close called May Day Green, and also of the market, demised the close to W.; and because the goods were wrongfully on the close, the defendants, as the servants of W., took and removed them. Rejoinder to replication to second plea—That A. being seized in fee of May Day Green, and also of the market, which was held as well upon the close in the second plea mentioned, as upon other parts of May Day Green, demised to W. the said close and other parts of May Day Green; that W. demised the close, being such part of May Day Green, to T. for the purpose of erecting a stall thereon for selling goods in the market, the said close not being an unreasonable quantity of land for that purpose, and there being sufficient ground left for other persons resorting to the market; and because the goods were wrongfully placed on the close without the leave of T., the defendants, as her servants, took the goods and removed them:—*Held*, on demurrer, that the rejoinders were bad, inasmuch as the demise to W. was subject to the right of market.

TRESPASS for seizing and taking the plaintiff's goods and chattels, to wit, potatoes, onions, hampers, baskets, measures, scales, and weights.

Second plea—That before and at the said time when &c. the defendant J. Woodruff was lawfully possessed of a certain close, called May Day Green, situate in the parish of Barnsley, in the county of York, and because the goods and chattels in the declaration mentioned, before and at the said time when &c., were wrongfully in and upon the said close, incumbering the same and doing damage there to the defendant J. Woodruff, and because the plaintiff, when requested so to do by the defendant, J. Woodruff, refused to remove the said goods and chattels from and off the said close, the defendant J. Woodruff in his own right, and the other defendants as his servants and by his command, seized and took the said goods and chattels in the said close so incumbering the same, and removed and carried away the same to a small and convenient distance, to wit, to the distance of ten yards from the said close, and there left the same for the use

of the plaintiff, doing no unnecessary damage to the said goods, &c.; *quæ sunt eadem*, &c.—Verification.

Fifth plea.—That, before and at the time when &c., one Mary Thompson was lawfully possessed of a certain close, part and parcel of certain land called May Day Green, situate &c., and because the goods and chattels in the declaration mentioned, before and at the same time when &c., were wrongfully in and upon the last-mentioned close, incumbering the same and doing damage to Mary Thompson, the defendants at the said time when &c., as the servants of Mary Thompson and by her command, seized and took the said goods and chattels in the last-mentioned close so incumbering the same, and removed and carried away the same to a small and convenient distance &c., doing no unnecessary damage, &c.; *quæ sunt eadem*.—Verification.

Replication to the second plea.—That, long before and until and at the said time when &c., there of right has been, and of right has been used and accustomed to be, and still of right ought to be, a certain public market held in and upon the said close in which &c., on Wednesday in each and every week throughout the year, for the buying and selling of all and all manner of provisions; and that, before and at the said time when &c., the same being on Wednesday, a certain public market was duly held in and upon the said close in which &c., for the buying and selling of all and all manner of provisions as aforesaid; and that the plaintiff, then being a person obtaining his livelihood by buying and selling provisions, before the said time when &c., to wit, on &c., brought into the said close in which &c., into the said public market there, the potatoes and onions in the declaration mentioned, for the purpose of exposing to sale and selling the same in the said market, the same being provisions as aforesaid, and then brought, together with the said potatoes and onions, the said hampers, baskets, &c., into the said close in which &c., the said hampers and baskets then holding and containing the said

1850.

TOWNEND
v.
WOODRUFF.

1850.
TOWNEND
v.
WOODRUFF.

potatoes and onions, and being necessary and proper for holding and containing the same, and being commonly of right used in the said market for that purpose, and being no inconvenience or annoyance to the holding the said market, or to any person buying or selling or trafficking thereat or therein, and the said measures, scales, and weights being necessary and proper utensils and implements of the said business of the plaintiff for, and being necessary and proper for, the measuring and weighing out of the said provisions on the sale thereof, and being commonly of right used in the said market for that purpose, and being no inconvenience or annoyance to the holding the said market, or to any person buying or selling or trafficking thereat or therein, which said potatoes and onions were in and upon the said close in which &c., so by the plaintiff exposed for sale as aforesaid, and held and contained as aforesaid, and with the said measures, scales, and weights for the purpose aforesaid, until the defendants of their own wrong afterwards, on the said Wednesday, during the said market so as aforesaid held, to wit, on &c., the said potatoes and onions in and upon the said close in which &c., in the said market so as aforesaid exposed to sale, and held and contained as aforesaid, with the said measures, scales, and weights, and other weights for the purpose aforesaid, seized, took, and conveyed away as in the declaration mentioned.—Verification.

The replication to the fifth plea was in terms the same.

Rejoinder to the replication to the second plea.—That before and at the time of the making of the demise herein-after next mentioned, William Pitt Earl Amherst, Henry Thomas Earl of Chichester, and the Reverend William Alderson, Clerk, were seised in their demesne as of fee of and in the said close called May Day Green, and were also seised as of fee of the said market, and being so seised, they the said William Pitt Earl Amherst, Henry Thomas Earl of Chichester, and the Reverend William Alderson, Clerk,

1850.
 TOWNEND
 v.
 WOODRUFF.

before the said time when &c., to wit, on &c., demised the said close, called May Day Green, to the defendant Joseph Woodruff, for one whole year then next ensuing, and so on, from year to year, as long as they the said William Pitt Earl Amherst, Henry Thomas Earl of Chichester, and the Reverend William Alderson, Clerk, and the said Joseph Woodruff, should respectively please; by virtue of which said demise the said Joseph Woodruff, afterwards and before the said time when &c., to wit, on &c., entered into and upon the said close called May Day Green, and became and was possessed thereof as in the said second plea mentioned. That the defendant, Joseph Woodruff, being so possessed of the said close called May Day Green, the plaintiff, before the said time when &c., had wrongfully, and without the leave or licence and against the will of the said Joseph Woodruff, put, placed, and set down the goods and chattels in the declaration mentioned, and because the same were at the said time when &c., without the leave or licence and against the will of the said Joseph Woodruff, wrongfully in and upon the said close, and set down and standing, lying, and resting in and upon the soil and ground thereof, and incumbering the same close, and doing damage there to the said Joseph Woodruff, and because the plaintiff, when requested so to do by the said Joseph Woodruff as aforesaid, refused to remove the said goods and chattels, he the defendant Joseph Woodruff in his own right, and the other defendants as his servants and by his command, seized and took the said goods and chattels in the said close so incumbering the same as aforesaid, and removed and carried away the same to a small and convenient distance, and there left the same for the use of the plaintiff, doing no unnecessary damage &c., as they lawfully might for the cause aforesaid.

—Verification.

The rejoinder to the replication to the fifth plea stated, that the same persons "were seised in their demesne as

1850.
TOWNEND
v.
WOODRUFF.

of fee of and in the land called May Day Green, in the fifth plea mentioned, and were also seised as of fee of the market in the replication to the fifth plea mentioned, and which said market, before and at the said time when &c., was held as well in and upon the said close in the fifth plea mentioned, as in and upon other parts of the said land called May Day Green." It then stated, as in the other rejoinder, a demise to Joseph Woodruff of "the said close in the fifth plea mentioned, and the said other parts of the said land called May Day Green, in and upon which the said market was so held as aforesaid;" by virtue of which said demise Joseph Woodruff entered and was possessed thereof. That Joseph Woodruff, being so possessed, "before the said time when &c., to wit, on &c., demised and let the close in the fifth plea mentioned, being such part and parcel of the said land called May Day Green, to the said Mary Thompson for a certain term, to wit, for the term of half a year, for the purpose of erecting a certain stall or standing in and upon the said close, being such part and parcel of the said land called May Day Green, and in the said market so held thereon, and on the said other parts of the said land called May Day Green, for the purpose of selling and disposing of goods and chattels at such stall or standing in the said market, the said close so being such part and parcel of the said land called May Day Green, not being an unreasonable quantity of land for that purpose, and there being sufficient market ground left for all other persons resorting thereto, and for all the purposes of the said market." The rejoinder then stated that Mary Thompson entered and was possessed of the said close, and because the goods were wrongfully placed thereon without the leave or licence of Mary Thompson, the defendants as her servants took the goods and removed them to a convenient distance &c.—Verification.

Special demurrer to the rejoinder to the replication to the second plea, assigning for causes (amongst others), that

the rejoinder is either a denial of the replication, in which case it is informal, and also should have concluded to the country; or it confesses the replication, and avoids it by matter which is either immaterial or improperly pleaded: also, that the defendants ought to have shewn by what right the owners in fee of the close and market demised the market, freed from and independent of the right to hold the market.

1850.
TOWNEND
v.
WOODRUFF.

There was a demurrer on similar grounds to the rejoinder to the replication to the fifth plea.

The defendant's points were, that the replications were insufficient, inasmuch as they admitted that the goods were upon the locus in quo incumbering the ground, without shewing any right to stallage or standage by licence from the owners of the soil or otherwise, or any satisfaction made to the owners of the soil for the use of it.

Cowling, in support of the demurrers.—The rejoinders are bad in form and substance. Their meaning is ambiguous. If intended to be a traverse of the right to hold the market, the traverse is informal; but if they admit the public right of market, they are bad in substance, for then it becomes immaterial whether or no the goods were placed there with the licence of Woodruff or his lessee.

The main question, however, is, whether the replications are good; and it is submitted that they are. Every person who brings to a market goods for sale has a right to place them on the ground, subject to groundage. The plaintiff does not set up a claim of piccage, or in any way to interfere with the soil. *The Mayor of Lawson's case* (a), and *Austin v. Whittred* (b), are express authorities that goods brought to a market, and there set on the ground, are not damage feasant, and cannot be distrained as such, though the owner refuse to pay toll: *Wigley v. Peachy* (c), *Mayor*

(a) Cro. Eliz. 75. (b) Willes, 623. (c) 2 Ld. Raym. 1589.

1850.
 TOWNEND
 v.
 WOODRUFF.

of *Norwich v. Swann*(a), and *Mayor of Northampton v. Ward*(b), do not militate against this view, but only decide that trespass lies for setting tables or erecting stalls in a market-place, without leave of the owner of the soil. If the plaintiff has occupied more ground than he ought to have done, the owner's remedy is not by distress, but by an action for compensation for the use of the soil.

Tomlinson, contra. —The question is best raised by the last replication and rejoinder. The goods were damage feasant on the close demised to Mary Thompson. A person entitled to sell goods in a market has no right to occupy the ground with baskets and measures to the exclusion of others. In *Austin v. Whittred*, the defendant relied rather upon his title to the market than on his title to the soil. In *Mayor of Norwich v. Swann*, the right to occupy ground in a market was construed with greater strictness than in the previous cases. In *Mayor of Northampton v. Ward*, the Court said, "that, by law, every man has, of common right, a liberty of coming into any public market, to buy and sell, without paying any toll, if it be not due by custom or prescription; but if he requires any particular easement or convenience, as a stall in the market, he must have the licence of the owner of the soil for that purpose, if there be no particular sum fixed by the custom of the market for stallage; but if there be a fixed sum or duty by custom, that cannot be exceeded, but still he must agree with the owner of the soil." [*Alderson*, B.—Erecting a stall is very different from placing goods in baskets on the ground for sale. A person must bring his produce to market in baskets or sacks, or other convenient modes. *Pollock*, C. B.—We are all clearly against you on this point.]

The rejoinder to the replication to the fifth plea is good. The defendants justify the removal of the plaintiff's goods as incumbering a close. The plaintiff replies that a public

(a) 2 W. Bl. 1115.

(b) 2 Str. 1238; 1 Wils. 107.

market was held in the close, to which the defendants rejoin a demise of a portion of the close for a stall, sufficient room in the market being left for other persons. *Prince v. Lewis*(a) shews, that the owner of a market is not bound to appropriate the whole space to the purposes of the market, if sufficient remain for accommodation of the persons resorting to it. He also referred to *Bennington v. Taylor*(b) and *Lockwood v. Wood*(c).

1850
TOWNEND
v.
WOODRUFF.

Cooling, in reply.—This is not the case of a letting of a stall to Mary Thompson. The defendant Woodruff had only a demise of the close, not of the market, and he demised a part of the close to Mary Thompson, but the right to regulate the market remained in the lords.

POLLOCK, C.B.—Our judgment must be for the plaintiff. The defendant Woodruff justifies under a demise of the close by the owners in fee, but that is subject to the right of market stated in the replication. Mary Thompson takes under a demise by Woodruff of a part of the close, and consequently her right is subject to the same right of market.

ALDERSON, B., ROLFE, B., and PLATT, B., concurred.

Judgment for the plaintiff.

(a) 5 B. & C. 363.

(b) 2 Lutw. 1517.

(c) 6 Q. B. 51.

1850.

June 4.

SLEIGH v. SLEIGH.

The drawer of an accommodation bill cannot sue the acceptor for money paid to his use to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. [Therefore, where the plaintiff drew and indorsed for the accommodation of the defendant, the acceptor, a bill of exchange, which, when due, was dishonoured, and the plaintiff, without having received notice of dishonour, and without any request from the defendant, paid a part of the bill to the holder:—*Held*, that he could not recover the amount from the defendant in an action for money paid to his use; for there was no implied undertaking to indemnify against a payment which the drawer voluntarily made, with full knowledge that he was not bound to pay.

Quære, whether the same rule applies to cases where the legal obligation has been discharged by circumstances unknown to the drawer.

ASSUMPSIT for money paid to the defendant's use.—
Plea, non assumpsit.

At the trial, before *Parke, B.*, at the Middlesex Sittings in Trinity Term, 1849, it appeared that the action was brought to recover the sum of 25*l.* paid by the plaintiff under the following circumstances:—The plaintiff drew and indorsed a bill of exchange for 100*l.* for the defendant's accommodation. It was delivered to the defendant, and he negotiated it; when due it was not paid by the defendant, but the plaintiff paid 25*l.* to the holder, in part, and that sum he sought to recover from the defendant in this form of action. The bill, not being taken up, remained in the hands of the holder, in order that he might recover the remainder from the defendant and other parties, and there was no proof of due presentment to the defendant, nor of notice of dishonour. The learned judge directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

Crowder, in the same Term, obtained a rule nisi accordingly. Against which—

Martin and *Bernard* shewed cause in the following Michaelmas Vacation (Dec. 5).—This was not a voluntary payment by the plaintiff in his own wrong. The drawer of a bill of exchange is under a moral obligation to pay it, especially where he signs his name as a surety, and if he chooses to waive due notice of dishonour, he may nevertheless recover against the acceptor. The defendant derived a benefit from the payment, for the holder of the bill could

only recover from him the residue: *Bacon v. Searles* (a). [Parke, B.—No doubt this was money paid for the acceptor's use, because it exonerated him pro tanto; but how was it paid at his request, for the plaintiff was not bound to pay the bill?] The payment was a benefit to the defendant, and therefore the law will imply a request. In point of law this was a contract of indemnity against any expense which the plaintiff might be put to by having drawn the bill: *Pownal v. Ferrand* (b), *Huntley v. Sanderson* (c). The defendant cannot take advantage of the want of notice of dishonour. As soon as he made default in the performance of his engagement, the plaintiff acquired an authority to pay the bill: *Alexander v. Vane* (d), *Simpson v. Penton* (e). In *Pitman on Principal and Surety* (f), it is said, "If the obligation which the surety engaged his principal should perform is the payment of a sum of money, and the money is due to the creditor under the contract, the surety may pay the creditor the money due to him, even though he did not pay the debt by the desire of the creditor; for the joint obligation of the principal and surety towards the creditor is sufficient to prove the principal's consent or authority to making that payment." In support of that doctrine reference is made to the judgment of Lord Kenyon, C. J., in *Exall v. Partridge* (g), *Broughton's case* (h), and the judgment of Lord Brougham, C., in *Hodgson v. Shaw* (i).

1850.
SLEIGH
v.
SLEIGH.

Crowder, in support of the rule.—The plaintiff was in the same position as a drawer for value, and was not obliged to pay the bill, except upon the receipt of due notice of dishonour. He might have sued the defendant on the bill, but cannot recover for money paid to his use; for the defend-

(a) 1 H. Bl. 88.

(b) 6 B. & C. 439.

(c) 1 C. & M. 467.

(d) 1 M. & W. 511.

(e) 2 C. & M. 430.

(f) Page 130.

(g) 8 T. R. 308.

(h) 5 Rep. 24.

(i) 3 My. & K. 183.

1850.

SLNIGH

v.

SLNIGH.

ant never requested him to dispense with notice of dishonour, or to pay the bill or any part of it. This was a voluntary payment by the plaintiff in his own wrong. In all the cases where a drawer has recovered against an acceptor for money paid to his use, the payment has been under compulsion, or, at all events, there has been a legal obligation to pay. Here the omission to give notice of dishonour discharged the plaintiff from all liability in respect of the bill: *Ex parte Heath* (a), *Bayley on Bills* (b).

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case was tried before me in the Sittings in Trinity Term last, when the plaintiff recovered a verdict, leave being reserved to the defendant to enter a nonsuit. A rule nisi was granted, and argued after Michaelmas Term.

The question is, whether the plaintiff can recover, in an action for money paid to the defendant's use, the sum of 25*£*, which he paid under these circumstances. [His Lordship stated the facts as above set forth.] It must be taken, therefore, for the purposes of this suit, that the plaintiff has paid the money without being compellable at law to do so. Now, to make a person liable in this form of action for money paid to the defendant's use, the plaintiff must not merely shew, that the money paid pro tanto discharges the liability of the defendant to the holder of the bill, but also that it was paid at the request, express or implied, of the defendant. Here the money paid clearly discharges pro tanto the liability of the defendant, as acceptor, to the holder; and it is also clear, that there was no *express* request from the defendant to the plaintiff to pay the money.

It remains, therefore, to be seen whether there was, from the circumstances, an *implied* request for him to do so. Now

(a) 2 V. & B 240.

(b) Page 295, 6th ed.

there is no doubt, that, if a person lends his name to another for his accommodation, the party accommodated undertakes to pay the bill at maturity, and further, to indemnify the person accommodating him, in case that person is compelled to pay the bill for him (*Byles on Bills*, p. 94); and this, no doubt, is an implied authority to such person to pay it, if he be in that situation that he may be compelled by law to pay the bill, though the holder do not actually compel him to do so; and after payment he may sue the party accommodated for money paid on his account; for such payment is, in truth, under the implied authority given by the contract of accommodation between the parties; and whether this be a payment of the whole bill, or of only a part of it, makes no difference. But the defendant, as the person accommodated, has not, we think, undertaken to indemnify the plaintiff against the consequences of any payment which the plaintiff may voluntarily make with knowledge of the circumstances. Whether it is so in cases in which the legal obligation has been discharged by circumstances unknown to him, as for instance, by the creditor having given time to the principal debtor without his knowledge, it is unnecessary to determine; but where a payment is made, as in this case, with the knowledge on the part of the plaintiff that he was not bound to pay, for the want of a notice of dishonour, to which he was unquestionably entitled, we think the payment is not made with the implied authority of the defendant. It is very true, that, if the plaintiff here had voluntarily paid the whole bill, he might have sued the defendant; but this is on another principle, viz., that the plaintiff becomes the holder of the bill after it is paid by him; and a holder so situated may, according to the law-merchant, sue the acceptor upon the bill itself; for the holder may always waive the want of due presentment and notice, and sue the acceptor, who is not discharged by the want of it, but not a collateral party, who is discharged by the same laches. But the holder in such case does not sue him as for the money paid to his use,

1850.

SLEIGH
v.
SLEIGH.

1850.
 SLIGH
 v.
 SLIGH.

nor is a request, express or implied, in such a case at all material to his recovering the amount. But here the plaintiff cannot sue on the bill; for, not having paid it, he is not the holder; and he has on these facts only paid money to the holder voluntarily, and without request, express or implied, from the defendant. We are, therefore, of opinion that the defendant is entitled to a rule absolute to enter a nonsuit.

Rule absolute.

June 5.

LEVY v. HAMER.

Proceedings
 in outlawry
 cannot be
 founded on a
 ca. sa. return-
 able "imme-
 diately after
 the execution
 thereof."

ERROR coram vobis to reverse proceedings in outlawry after final judgment. The error assigned was, that the writ of capias ad satisfaciendum, which issued in vacation, was made returnable "immediately after the execution thereof," whereas it ought to have been made returnable on a day certain in Term.

Lush, for the plaintiff in error.—Proceedings in outlawry cannot be founded on a writ of capias returnable immediately after the execution thereof. At common law, the capias must have been returnable on a general return day, and the *exigi facias* tested on the *quarto die post* of the return of the capias: *Tidd. Prac.* 129, 132. The 2 Will. 4, c. 39, s. 6, enacts, "that, after judgment given in any action commenced by writ of summons, &c., under the authority of this Act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ:" that means by capias returnable on a day certain. The 3 & 4 Will. 4, c. 67, s. 2, which is relied on by the plaintiff, enacts, "that all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof." But the object of that enactment

was to facilitate the recovery of the fruits of the judgment, by enabling the party to compel the sheriff to render an account forthwith. An outlawry cannot be founded on such a writ, for it never can be returnable until after it is executed. A *fi. fa.* returnable "immediately after the execution thereof, is not executed until the whole amount indorsed is levied under it: *Jordan v. Binches* (a); and in like manner a *ca. sa.* of that description is current until the defendant is arrested upon it. Bail cannot be fixed by such a writ: *Kemp v. Hyslop* (b). This point was determined by the Court of Queen's Bench in *Lewis v. Holmes* (c), where Lord Denman, C. J., in delivering the judgment of the Court, says, "First, it is said that no proceedings to outlawry can be grounded on a *ca. sa.* returnable immediately after execution, as such writ can only be executed by arresting the defendant, in which case there is no ground for proceeding to outlawry. If he be not arrested, the writ does not become returnable; and the fact of its being returned cannot help, whether it is done by a Judge's order or not; for, strictly speaking, no writ can be returned before it is returnable, although a Judge may order the sheriff to return what he has done upon it, and so, in some sense, to return the writ."

1850.
LEVY
v.
HAMMER.

S. Temple, in support of the rule.—If *Lewis v. Holmes* was correctly decided, no doubt this case must be governed by it; but it proceeded on the authority of *Kemp v. Hyslop*, and the reasons there given do not support it.—[*Pollock*, C. B.—The case of *Lewis v. Holmes* is in point, and, if incorrectly decided, must be set right by a Court of Error.]

PER CURIAM (d)—

Judgment for the defendant.

(a) 18 L. J., Q. B., 227.

(b) 1 M. & W. 58.

(c) 10 Q. B. 896.

(d) *Pollock*, C. B., *Alderson*, B.,
Rolfe, B., *Platt*, B.

1850.

SLIGH
v.
SLIGH.

nor is a request, express or implied, in such a case at all material to his recovering the amount. But here the plaintiff cannot sue on the bill; for, not having paid it, he is not the holder; and he has on these facts only paid money to the holder voluntarily, and without request, express or implied, from the defendant. We are, therefore, of opinion that the defendant is entitled to a rule absolute to enter a nonsuit.

Rule absolute.



June 5.

LEVY v. HAMER.

Proceedings
in outlawry
cannot be
founded on a
ca. sa. return-
able "imme-
diately after
the execution
thereof."

ERROR coram vobis to reverse proceedings in outlawry after final judgment. The error assigned was, that the writ of *capias ad satisfaciendum*, which issued in vacation, was made returnable "immediately after the execution thereof," whereas it ought to have been made returnable on a day certain in Term.

Lush, for the plaintiff in error.—Proceedings in outlawry cannot be founded on a writ of *capias* returnable immediately after the execution thereof. At common law, the *capias* must have been returnable on a general return day, and the *exigi facias* tested on the *quarto die post* of the return of the *capias*: *Tidd. Prac.* 129, 132. The 2 Will. 4, c. 39, s. 6, enacts, "that, after judgment given in any action commenced by writ of summons, &c., under the authority of this Act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ:" that means by *capias* returnable on a day certain. The 3 & 4 Will. 4, c. 67, s. 2, which is relied on by the plaintiff, enacts, "that all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof." But the object of that enactment

was to facilitate the recovery of the fruits of the judgment, by enabling the party to compel the sheriff to render an account forthwith. An outlawry cannot be founded on such a writ, for it never can be returnable until after it is executed. A *fi. fa.* returnable "immediately after the execution thereof, is not executed until the whole amount indorsed is levied under it: *Jordan v. Binches* (a); and in like manner a *ca. sa.* of that description is current until the defendant is arrested upon it. Bail cannot be fixed by such a writ: *Kemp v. Hyslop* (b). This point was determined by the Court of Queen's Bench in *Lewis v. Holmes* (c), where Lord Denman, C. J., in delivering the judgment of the Court, says, "First, it is said that no proceedings to outlawry can be grounded on a *ca. sa.* returnable immediately after execution, as such writ can only be executed by arresting the defendant, in which case there is no ground for proceeding to outlawry. If he be not arrested, the writ does not become returnable; and the fact of its being returned cannot help, whether it is done by a Judge's order or not; for, strictly speaking, no writ can be returned before it is returnable, although a Judge may order the sheriff to return what he has done upon it, and so, in some sense, to return the writ."

1850.
LEVY
v.
HAMER.

S. Temple, in support of the rule.—If *Lewis v. Holmes* was correctly decided, no doubt this case must be governed by it; but it proceeded on the authority of *Kemp v. Hyslop*, and the reasons there given do not support it.—[*Pollock*, C. B.—The case of *Lewis v. Holmes* is in point, and, if incorrectly decided, must be set right by a Court of Error.]

PER CURIAM (d)—

Judgment for the defendant.

(a) 18 L. J., Q. B., 227.

(b) 1 M. & W. 58.

(c) 10 Q. B. 896.

(d) *Pollock*, C. B., *Alderson*, B.,
Rolfe, B., *Platt*, B.

1850.

SLNIGH
v.
SLNIGH.

nor is a request, express or implied, in such a case at all material to his recovering the amount. But here the plaintiff cannot sue on the bill; for, not having paid it, he is not the holder; and he has on these facts only paid money to the holder voluntarily, and without request, express or implied, from the defendant. We are, therefore, of opinion that the defendant is entitled to a rule absolute to enter a nonsuit.

Rule absolute.

June 5.

LEVY v. HAMER.

Proceedings in outlawry cannot be founded on a ca. sa. returnable "immediately after the execution thereof."

ERROR coram vobis to reverse proceedings in outlawry after final judgment. The error assigned was, that the writ of capias ad satisfaciendum, which issued in vacation, was made returnable "immediately after the execution thereof," whereas it ought to have been made returnable on a day certain in Term.

Lush, for the plaintiff in error.—Proceedings in outlawry cannot be founded on a writ of capias returnable immediately after the execution thereof. At common law, the capias must have been returnable on a general return day, and the *exigi facias* tested on the *quarto die post* of the return of the capias: *Tidd. Prac.* 129, 132. The 2 Will. 4, c. 39, s. 6, enacts, "that, after judgment given in any action commenced by writ of summons, &c., under the authority of this Act, proceedings to outlawry or waiver may be had and taken, and judgment of outlawry or waiver given, in such manner and in such cases as may now be lawfully done after judgment in an action commenced by original writ:" that means by capias returnable on a day certain. The 3 & 4 Will. 4, c. 67, s. 2, which is relied on by the plaintiff, enacts, "that all writs of execution may be tested on the day on which the same are issued, and be made returnable immediately after the execution thereof." But the object of that enactment

was to facilitate the recovery of the fruits of the judgment, by enabling the party to compel the sheriff to render an account forthwith. An outlawry cannot be founded on such a writ, for it never can be returnable until after it is executed. A *fi. fa.* returnable "immediately after the execution thereof, is not executed until the whole amount indorsed is levied under it: *Jordan v. Binches* (a); and in like manner a *ca. sa.* of that description is current until the defendant is arrested upon it. Bail cannot be fixed by such a writ: *Kemp v. Hyslop* (b). This point was determined by the Court of Queen's Bench in *Lewis v. Holmes* (c), where Lord Denman, C. J., in delivering the judgment of the Court, says, "First, it is said that no proceedings to outlawry can be grounded on a *ca. sa.* returnable immediately after execution, as such writ can only be executed by arresting the defendant, in which case there is no ground for proceeding to outlawry. If he be not arrested, the writ does not become returnable; and the fact of its being returned cannot help, whether it is done by a Judge's order or not; for, strictly speaking, no writ can be returned before it is returnable, although a Judge may order the sheriff to return what he has done upon it, and so, in some sense, to return the writ."

1850.
LEVY
v.
HAMER.

S. Temple, in support of the rule.—If *Lewis v. Holmes* was correctly decided, no doubt this case must be governed by it; but it proceeded on the authority of *Kemp v. Hyslop*, and the reasons there given do not support it.—[*Pollock*, C. B.—The case of *Lewis v. Holmes* is in point, and, if incorrectly decided, must be set right by a Court of Error.]

PER CURIAM (d)—

Judgment for the defendant.

(a) 18 L. J., Q. B., 227.

(b) 1 M. & W. 58.

(c) 10 Q. B. 896.

(d) *Pollock*, C. B., *Alderson*, B.,
Rolfe, B., *Platt*, B.

1850.

June 8. THE ATTORNEY-GENERAL v. THE GREAT WESTERN RAILWAY COMPANY.

By the 5 & 6 Will. 4, c. cvii. the Great Western Railway Company were authorised to take certain toll for the conveyance of passengers and goods. By the 9 & 10 Vict. c. cccxxvii. and the 9 & 10 Vict. c. cccxxviii. which Acts received the Royal Assent on the 3rd

August, 1846, a Company was incorporated, called The Birmingham and Oxford Junction Railway Company, who were authorised to receive toll at a rate less than the scale of tolls on the Great Western Railway. Those Acts empowered the Great Western Railway Company to purchase the Birmingham and Oxford Junction Line, provided that no such purchase should take effect until the tolls of the Great Western Railway should have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. On the same 3rd of August, 1846, the Royal Assent was given to the 9 & 10 Vict. c. cccxv. whereby a Company was incorporated, called The Birmingham, Wolverhampton and Dudley Railway Company, who were authorised to receive the same tolls as the Birmingham and Oxford Junction Railway Company. By an agreement dated the 12th November, 1846, the Directors of the Birmingham and Oxford Railway Company, and the Directors of the Birmingham, Wolverhampton and Dudley Railway Company, agreed to sell to the Great Western Railway Company, and that Company agreed to purchase, the Birmingham and Oxford Junction Railway, and the Birmingham, Wolverhampton and Dudley Railway. Afterwards, 10 & 11 Vict. c. cxlix. passed, which empowered the Great Western Railway to purchase the Birmingham, Wolverhampton and Dudley Railway; and it was by that Act provided, that the Great Western Railway Company might demand for their own use, or of the Birmingham, Wolverhampton and Dudley Railway Company, a scale of toll, being materially less than that fixed by the 5 & 6 Will. 4, c. cvii. but not precisely the same as that authorised by the 9 & 10 Vict. c. cccxxvii. and 9 & 10 Vict. c. cccxxviii. By the 10 & 11 Vict. c. cccxvi. which received the Royal Assent on the 22nd July, 1847, the Birmingham, Wolverhampton and Dudley Railway Company were again authorised to sell their railway to the Great Western Railway Company, and it was enacted, that the reduced scale of tolls therein contained, and which is precisely the same as that contained in the 10 & 11 Vict. c. cxlix. should be deemed and taken to be the reduced scale referred to in the 9 & 10 Vict. c. cccxxvii.—*Held*, that, until the purchase of one or both of the lines was finally effected, the Great Western Railway Company were entitled to take the toll authorised by the 5 & 6 Will. 4, c. cvii. but that, after the completion of either of the purchases, the scale of tolls to be taken by the Great Western Railway, as well on their original line as on the purchased line or lines, must be reduced to the scale fixed by the 10 & 11 Vict. c. cccxvi. and 10 & 11 Vict. c. cxlix.

AN information having been filed by the Attorney General in the Court of Chancery against the Great Western Railway Company, for charging, for the conveyance of passengers and goods, rates exceeding those allowed by law, the following case was stated by order of Vice-Chancellor *Wigram*, for the opinion of this Court:

By the 5 & 6 Will. 4, c. cvii, intituled "An Act for making a railway from Bristol to join the London and Birmingham Railway near London, to be called The Great Western Railway, with branches therefrom," &c., the subscribers were united into a Company for making such railway, and

for the other purposes therein mentioned, and were incorporated by the name and style of The Great Western Railway Company; and the said Act, after enactments enabling the Company to raise the capital for the undertaking, to be divided into shares, and enacting that the respective shareholders should be entitled to receive in proportionable parts, according to the sums by them respectively paid, the net profits and advantages which should arise or accrue from or by the rates, tolls, and other sums of money to be received by the said Company, as and when the same should be divided by the authority of the said act, and providing for the application of the money to be raised thereby, empowered the Company to make the railway and the branch railways therein mentioned, in the line or course therein described, with power to take lands and to treat for the purchase thereof, as therein set forth. (The case then set out sections 163, 164, and 165 (a).) And the said Act contained clauses enabling the said Company to provide and charge for locomotive or other propelling

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

(a) Sect. 163 enacts, "That all persons shall have free liberty to pass along and upon and to use and employ the said railway with carriages properly constructed as by this Act directed, upon payment only of such rates and tolls as shall be demanded by the said Company, not exceeding the respective rates or tolls by this Act authorised, and subject to the provisions of this Act, and to the rules and regulations which shall from time to time be made by the said Company, or by the said directors, by virtue of the powers to them respectively by this Act granted."

Sect. 164 enacts, "That it shall be lawful for the said Company

to demand, receive, and recover, to and for the use and benefit of the said Company, for the tonnage of all articles, matters, and things which shall be conveyed upon or along the said railway, any rates or tolls not exceeding the following:" (Then follows a scale of charges per ton per mile.)

Sect. 165 enacts, "That it shall be lawful for the said Company to demand, receive, and recover, to and for the use and benefit of the said Company, for or in respect of passengers, beasts, cattle, and animals conveyed in carriages upon the said railway, any tolls not exceeding the following:" (Then follows a scale of charges per mile.)

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

power upon the said railway, or any other railway communicating therewith; or to carry passengers, cattle, or goods by means thereof, and to charge for the same the rates therein referred to; and the Act contained regulations for the luggage carried by passengers, and for the carriage of small parcels, and the charges for small distances. (The case then set out the 174th section (a).)

By another Act, 6 Will. 4, c. xxxviii. intituled "An Act to alter the line of the Great Western Railway, and to amend the Act relating thereto," certain enactments were made and passed, whereby the Great Western Railway Company were authorised to alter and vary the line of their railway in the particulars therein expressed; and such Act contains various clauses and provisions relating thereto.

By another Act, 1 Vict. c. xcii, intituled "An Act to enable the Great Western Railway Company to extend the line of such railway, and for other purposes relating thereto," the said Company were authorised, in the manner and subject to the restrictions and regulations therein provided, to extend the line of the said railway to the basin of the Paddington Canal at Paddington, and to levy certain additional or increased rates and tolls for the passengers and goods conveyed upon or along the said extended line of railway or any part thereof, in lieu of the rates or tolls authorised to be demanded by the said first-recited Act, not exceeding the rates or tolls expressed in the now stating Act.

Under the provisions and powers contained in the said Act of Parliament, the Great Western Railway, with such

(a) Sect. 174 enacts, "That it shall be lawful for the said Company, from time to time, as they shall think fit, to reduce all or any of the rates or tolls by this Act authorised to be taken, and to take the reduced rates; and afterwards from time to time again to raise the same or any of them, and then to take such higher rates, so that the same respectively shall not at any time exceed the amount by this Act authorised."

alteration and extension of the line thereof as authorised by the said secondly and thirdly-mentioned Acts, was completed and has been carried on by the said Great Western Railway Company, from time to time, down to the present time, in respect of the carriage of passengers and goods carried on and over the said Great Western Railway, and the various stages or parts thereof, who have charged and taken from the passengers and other persons using the said railway, rates, tolls, and charges not exceeding those authorised by the said first and thirdly-mentioned Acts.

The Great Western Railway Company, prior to the passing of the next hereinafter-mentioned Act, had, under the authority of Parliament, become the purchasers of the undertaking known as the Oxford and Rugby Railway.

By the 9 & 10 Vict. c. cccxxxvii. which received the Royal Assent on the 3rd of August, 1846, and was intituled "An Act for making a Railway from Birmingham to join the Lines of the proposed Oxford and Rugby, and Oxford, Worcester and Wolverhampton Railways, and to be called The Birmingham and Oxford Junction Railway," after enacting, amongst other things, that in citing that Act it should be sufficient to use the expression "The Birmingham and Oxford Junction Railway Act, 1846," it was enacted:— [The case then set out sections 64, 65, 66, 67, 68, 69, 70, and 71 (a).]

1850.
ATT.-GEN.
v.
GREAT
WESTERN
RAILWAY CO.

(a) Sect. 64 enacts, "That the maximum rate of charge to be made by the Company, for the conveyance of passengers upon the said railway including the tolls for the use of the railway and of carriages, and for locomotive power, and every other expense incidental to such conveyance, shall not exceed the follow-

ing sums:" (Then follows a scale of charges.)

Sect. 65. "And with respect to the conveyance of horses, cattle, carriages, and goods, be it enacted, that the maximum rates of charge to be made by the Company, including the tolls for the use of the railway and wagons or trucks and locomotive power,

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

The several rates, by the last-stated Act authorised to be taken in respect both of passengers and goods, were

and every expense incidental to such conveyance, except the loading and unloading of goods, where such service is performed by the Company, shall not exceed the following sums : " (Then follows a scale of charges.)

Sect. 66. " Provided always, and be it enacted, that the restriction as to the charges to be made for passengers shall not extend to any special or extra train that may be required to be run upon the said railway, but shall apply only to the ordinary trains appointed or to be appointed from time to time by the said Company for the conveyance of passengers and goods upon the said railway."

Sect. 67. " Provided further and be it enacted, that nothing herein contained shall be held to prevent the said Company from taking any increased charge, over and above the charges herein-before limited, for the conveyance of goods of any description, by agreement with the owners of, or persons in charge of, such goods, either in respect of the conveyance thereof by passenger trains, or by reason of any other special service performed by the said Company in relation thereto."

Sect. 68 enacts, " That it shall be lawful for the Company to let on lease the railways hereby authorised to be made, or any part thereof respectively, to the Great Western Railway Company, for such term of years and on such

conditions as may be mutually agreed on; and it shall be lawful for the said Great Western Railway Company, with the approbation of three-fifths of the shareholders in such last-mentioned Company present, personally or by proxy, in general meeting especially convened for the purpose, to accept and take such lease."

Sect. 69 enacts, " That it shall also be lawful for the Company hereby incorporated, by and with the authority of three-fifths of the votes of the proprietors who may be present, either personally or by proxy, at some general meeting specially convened for the purpose, to sell and transfer to the said Great Western Railway Company, and for such last-mentioned Company, by and with the like authority on the part of the proprietors thereof, to purchase the railways by this Act authorised to be made, or any part thereof, or any share or interest therein, and whether before or after the completion thereof; and on completion of such purchase, (of which completion a transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Company hereby incorporated, shall be sufficient evidence), the said Great Western Railway Company may have and hold the said railways, or the part thereof, or the share therein

rates in most instances below and less than the rates which were authorised to be taken by the Great Western Railway

purchased by them, and use, exercise, and enjoy, or participate in the use, exercise, and enjoyment of all or any of the rights, powers, and privileges, conferred by this Act on the Company hereby incorporated in relation thereto; and for such purpose it shall be lawful for the Great Western Railway Company, if they see fit, by and with such authority as aforesaid, to create such additional number of shares in the undertaking of the Great Western Railway, and to borrow upon mortgage such a sum of money as may be necessary for completing such purchase, &c.; and from and after such purchase as aforesaid, if any such shall take place, the railways by this Act authorised to be made, or such of them, or such part or parts thereof respectively as may be so purchased by the said Great Western Railway Company, shall thenceforth be and become amalgamated with, and shall form part of the undertaking belonging to such last-named Company; and from thenceforth all the provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, rules, clauses, matters, and things contained in this Act or the said recited Acts relating to the railways hereby authorised to be made, which may so become amalgamated with the Great Western Railway, shall, with reference to all such railways, works, matters, and things

as might have been made or done by the Company hereby incorporated, be applied and applicable to the said Great Western Railway Company, their officers, agents, and servants, in every respect as if the said Great Western Railway Company had been in every case in this Act written or referred to in lieu and stead of the Birmingham and Oxford Junction Railway Company."

Sect. 70. "Provided always and be it enacted, that no lease or sale of the said railway to the Great Western Railway Company under the powers hereinbefore contained shall take effect, unless and until the maximum tolls and charges on the said Great Western Railway shall have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges which the Company hereby incorporated are by this Act empowered to take on the railway hereby authorised. Provided, nevertheless, that if the said railway shall not be purchased or rented by the said Great Western Railway Company, under the provisions hereinbefore contained, it shall be lawful for the said last-mentioned Company to use the railway hereby authorised, on such terms and subject to such regulations, and on payment of such rates and tolls not exceeding the rates and tolls by this Act directed, as may be agreed on between the said Companies, or, in the event of

1850.
ATT.-GEN.
V.
GREAT
WESTERN
RAILWAY CO.

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

Company, in respect both of passengers and goods on the Great Western Railway, under the said hereinbefore-stated Acts relating to the Great Western Railway.

By the 9 & 10 Vict. c. cccxxxviii. intituled, "An Act for making a Railway into Birmingham in extension of the proposed Birmingham and Oxford Junction Railway," which also received the Royal Assent on the 3rd of August, 1846, after reciting (among other things) that a bill, being the bill which was passed into law under the title of the said "Birmingham and Oxford Junction Railway Act, 1846," was then pending before Parliament, and that the making of a railway diverging from the proposed line of the Birmingham and Oxford Junction Railway, at or near Adderley-street, in the borough of Birmingham and county of Warwick, and terminating at or near Great Charles-street in the parish of Birmingham, would be of public advantage; it was thereby enacted (amongst other things), that, in citing that Act, it should be sufficient to use the expression "The Birmingham and Oxford Junction (Birmingham Extension) Railway Act, 1846;" and it was thereby enacted, that the persons therein named, and all other persons and corporations, who had already subscribed or should there-

difference between them, as may be settled by arbitration, &c."

Sect. 71 enacts, "That it shall be lawful for the Company hereby incorporated, and for the said Great Western Railway Company, to make and enter into such contracts or agreements for effecting the purposes aforesaid, or for otherwise working or using the said railways or any part thereof, or for the maintenance and repair thereof or any part thereof, as they the said Companies may respectively deem advisable, and subject to such terms and condi-

tions as may be mutually agreed on between them; and any contract or agreement made before the passing of this Act for all or any of the purposes aforesaid by the provisional committee of the Company hereby incorporated and the directors of the said Great Western Railway, with the sanction of any general meeting of the said last-mentioned Company, shall be as valid and binding in every respect as if made subsequently to the passing of this Act, and in conformity with the provisions hereof."

after subscribe to the undertaking, and their executors, &c., should be united into a Company, for the purpose of making and maintaining such railway, and should be incorporated by the name of "The Birmingham and Oxford Junction Railway Company."—[The case then set out sections 35, 36, 37, 38, 40(a).]

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

(a) Sect. 35 enacts, "That it shall be lawful for the Company to demand any tolls for the use of the railway, and of the engines and carriages employed by them thereon, not exceeding the tolls which, by the bill relating to the said Birmingham and Oxford Junction Railway, if the same shall pass into a law, may be authorised to be demanded in respect of the use of that railway, and of the engines and carriages employed thereon; and all the provisions of the said bill when passed into a law, with reference to the regulations of such last-mentioned tolls, shall be applicable to the regulation of the tolls by this Act authorised."

Sect. 36 enacts, "That it shall be lawful for the Company to let on lease the railway hereby authorised to be made, or any part thereof, to the Great Western Railway Company, for such term of years, and on such conditions, as may be mutually agreed on; and it shall be lawful for the said Great Western Railway Company, with the approbation of three-fifths of the shareholders in such last-mentioned Company present, personally or by proxy, in general meeting especially convened for the purpose, to accept and take such lease."

Sect. 37 enacts, "That it shall also be lawful for the Company hereby incorporated, by and with the authority of three-fifths of the votes of the proprietors who may be present, either personally or by proxy, at some general meeting especially convened for the purpose, to sell and transfer to the said Great Western Railway Company, and for such last-mentioned Company, by and with the like authority on the part of the proprietors thereof, to purchase the railway by this Act authorised to be made, or any part thereof, or any share or interest therein, and whether before or after the completion thereof; and on completion of such purchase (of which completion a transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Company hereby incorporated, shall be sufficient evidence), the said Great Western Railway Company may have and hold the said railway, or the part thereof, or the share therein purchased by them, and use, exercise, and enjoy, or participate in the use, exercise, and enjoyment of all or any of the rights, powers, and privileges conferred by

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

By another Act of Parliament of the same session(a), which also received the Royal Assent on the 3rd of August,

this Act on the Company hereby incorporated in relation thereto," &c.; "and from and after such purchase as aforesaid, if any such should take place, the railway by this Act authorised to be made, or such part thereof as may be so purchased by the said Great Western Railway Company, shall thenceforth be and become amalgamated with and shall form part of the undertaking belonging to such last-mentioned Company," &c.

Sect. 38. "Provided always and be it enacted, that no lease or sale of the said railway to the Great Western Railway Company, under the powers hereinbefore contained, shall take effect, unless and until the maximum tolls and charges on the said Great Western Railway Company should have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges which the Company hereby incorporated are by this Act empowered to take on the railway hereby authorised," &c.

Sect. 40. "And whereas the subscribers towards the undertaking hereby authorised are also subscribers towards the said Birmingham and Oxford Junction Railway, and the directors of the railway hereby authorised to be made are also directors of the said Birmingham and Oxford

Junction Railway and the Company hereby incorporated, as well as the Company engaged in the promotion of the said Birmingham and Oxford Junction Railway, are willing that the said two undertakings should be united into one; be it, therefore, enacted, that if the bill for making the said Birmingham and Oxford Junction Railway shall pass into a law in the present session of Parliament, and a Company be thereby incorporated for carrying such railway into effect, the Company hereby incorporated shall merge in and become united and incorporated with the said Birmingham and Oxford Junction Railway Company, and the several shareholders in the Company hereby incorporated shall be and become shareholders in the Birmingham and Oxford Junction Railway Company, with all such rights and privileges as the other shareholders in that Company, and all the capital by this Act authorised to be raised shall be and become part of the capital of the said Birmingham and Oxford Junction Railway; and all the powers, rights, and privileges by this Act or by the recited Acts conferred on the Company hereby incorporated, shall and may be exercised by the said Birmingham and Oxford Junction Railway Company, in like manner as though the same

1846, and which is known by the title of "The Birmingham, Wolverhampton and Dudley Railway Act, 1846," another Company was incorporated under the name of "The Birmingham, Wolverhampton, and Dudley Railway Company," for the purpose of making a railway from Birmingham to Wolverhampton and Dudley, to be called the Birmingham, Wolverhampton and Dudley Railway, with power to take and levy, for the use of the said railway, and in respect of the conveyance of passengers and goods thereon, the rates, tolls, and charges therein set forth, the maximum rates, tolls, and charges thereby authorised being the same as those authorised by "The Birmingham and Oxford Junction Railway Act, 1846."

"The Birmingham, Wolverhampton and Dudley Act, 1846," did not contain any power of leasing or selling the Birmingham, Wolverhampton and Dudley Railway to the Great Western Railway Company, or any other Company.

By the two before-mentioned Acts incorporating the Birmingham and Oxford Junction Railway Company, the capital of that Company was fixed at 1,000,000*l.*, divided into 50,000 shares of 20*l.* each; and by the said Act incorporating the Birmingham, Wolverhampton and Dudley Railway Company, the capital of such Company was fixed at 700,000*l.*, divided into 35,000 shares of 20*l.* each.

On the 12th November, 1846, an agreement was entered into between the respective directors of the Great Western Railway Company, and the directors of the Birmingham and Oxford Railway Company, and of the Birmingham, Wolverhampton and Dudley Railway Company, for the pur-

1850.
ATT.-GEN.
v.
GREAT
WESTERN
RAILWAY CO.

had been specifically conferred on the said last-mentioned Company; and all provisions in this Act or in the said recited Acts contained or referred to applicable to the Company hereby incorporated, shall be applicable to the said Bir-

mingham and Oxford Junction Railway Company, in like manner as though such last-mentioned Company had been named or referred to in such provisions in lieu of the Company hereby incorporated."

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

chase of the said two lines by the Great Western Railway Company. [The case set out the agreement, the terms of which, however, are not material to the point in question.]

This agreement of the 12th of November, 1846, was afterwards confirmed by resolutions passed at meetings of the shareholders of the said respective Companies, but, subsequently to such confirmation thereof, was disputed by a majority of the shareholders in the Birmingham and Oxford Junction Railway Company, who alleged that the agreement was not warranted by, or conformable with, the provisions of the said Birmingham and Oxford Junction Railway Acts, and caused proceedings to be instituted in the Court of Chancery for the purpose of preventing the said agreement from being carried into execution, and which proceedings were still pending at the times of the passing of the two several Acts next hereinafter mentioned, and during the progress thereof through Parliament.

By the 10 & 11 Vict. c. cxlix. which received the Royal Assent on the 9th of July, 1847, intituled "An Act for enabling the Birmingham, Wolverhampton and Dudley Railway Company to purchase lands for additional station room at Birmingham, and for authorising the sale of the undertaking of the said Company to the Great Western Railway Company," after reciting, amongst other things, that in citing that Act it should be sufficient to use the expression "The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847:" it was by the 13th section of the now stating Act enacted, that it should be lawful for the said Great Western Railway Company to demand any tolls for the use of the Great Western Railway, or of the Birmingham, Wolverhampton and Dudley Railway, in respect of passengers, cattle, and goods, not exceeding the sums and charges therein specified and set forth. By the 14th sect. it was enacted, that the toll which the Great Western Railway Company might demand for the use of engines for propelling the carriages of other parties on the said railways as aforesaid

should not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls or sums by that Act authorised to be taken for the use of the said railways. By the 15th section it was enacted, that the maximum rate of charge to be made by the Great Western Railway Company for the conveyance of passengers along the said railways as aforesaid, including the tolls for the use of the said railways and carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the schedule annexed hereto (a), and which in many instances are less, but in no instance more, than the sums authorised to be taken on the like account by the said "Birmingham, Wolverhampton and Dudley Railway Act, 1846;" and with respect to the conveyance of goods, it was by the said 15th section enacted, that the maximum rates of charge to be made by the Great Western Railway Company for the conveyance thereof along the said railways as aforesaid, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services, or any of them, were or was performed by the said Company, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the schedule annexed hereto (b), and which also in many instances are less, and in no instance more, than the sums authorised to be taken on the like account by the said

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY Co.

(a) See post, p. 539, note.

(b) See post, p. 540, note.

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

"Birmingham, Wolverhampton and Dudley Railway Act, 1846." [The case then set out sections 16, 17, 22, 23, 24, 25, 28(a).]

(a) Sect. 16 enacts, "That where any such articles, matters, or things should be carried a distance exceeding fifteen miles or fifty miles respectively, as thereinbefore provided, the Great Western Railway Company are hereby empowered to demand and receive, at the least, the rates, tolls, or charges, hereinbefore specified, as for fifteen miles or fifty miles respectively."

Sect. 17 enacts, "That certain provisions and regulations therein expressed, in respect of passengers and goods conveyed on the said railways for short distances, and in respect of fractional distance and weights, shall be applicable to the fixing of all the tolls and charges under the Act authorised, and with respect to small packages and single articles of great weight, it is enacted, that, notwithstanding the rate of tolls provided by the said Act, the Company might lawfully demand the tolls therein mentioned."

Sect. 22. "Provided always and be it enacted, that nothing herein contained shall be held to prevent the said Company from taking any increased charge, over and above the charges hereinbefore limited, for the conveyance of goods of any description, by agreement with the owners of or persons in charge of such goods, either in

respect of the conveyance thereof by passenger or other trains, or by reason of any other special service performed by the said Company in relation thereto."

Sect. 23. "Provided also and be it enacted, that the restriction as to the charges to be made for passengers shall not extend to any special or extra trains that may be required upon the said railways, but shall apply only to the ordinary trains appointed or to be appointed, from time to time, by the said Company, for the conveyance of passengers and goods upon the said railways."

Sect. 24. "And whereas, by certain articles of agreement, bearing date the 12th day of November, 1846, and entered into between the directors of the Great Western Railway Company, the directors of the Birmingham and Oxford Junction Railway Company, and the directors of the Company incorporated by the recited Act, and which agreement has been approved of and confirmed by the shareholders in the last-mentioned Company, and also by the shareholders in the Great Western Railway Company present at meetings of those Companies respectively specially convened for the purpose, it has been agreed that the undertaking authorised by the recited Act, as well as the

By the 10 & 11 Vict. c. cccxvi. which received the Royal Assent on the 22nd of July, 1847, and was intituled "An Act for making branch railways from the Great Western

1850.
ATT.-GEN.
v.
GREAT
WESTERN
RAILWAY CO.

further works which may be authorised by this Act, shall be sold and transferred to the Great Western Railway Company, on the terms and conditions mentioned in the said agreement; be it therefore enacted, that it shall be lawful for the Company to sell and transfer to the Great Western Railway Company, and for such last-mentioned Company to purchase, the undertaking authorised by the recited Act and by this Act; and on the completion of such purchase (of which completion a transfer or conveyance duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the Birmingham, Wolverhampton and Dudley Railway Company, shall be sufficient evidence), the Great Western Railway Company may have and hold the said undertaking, and may use, exercise, and enjoy all the rights, powers, and privileges conferred by the recited Act and by this Act on the Birmingham, Wolverhampton and Dudley Railway Company in relation thereto; and from and after such purchase all the provisions, directions, penalties, forfeitures, payments, exemptions, remedies, regulations, rules, clauses, matters, and things contained in this Act or the recited Act relating to the

undertaking shall, with reference to all such railways, works, matters, and things as might have been constructed, maintained, used, made, or done by the said Birmingham, Wolverhampton and Dudley Railway Company, be applied and applicable to the Great Western Railway Company, their officers, agents, and servants, in every respect as if the Great Western Railway Company had been in every case in this Act and in the recited Act written or referred to in lieu and stead of the Birmingham, Wolverhampton and Dudley Railway Company."

Sect. 25. "Provided always, and be it enacted, that it shall not be lawful for the said Birmingham, Wolverhampton and Dudley Railway Company, by virtue of the powers hereinbefore contained, to transfer, nor for the said Great Western Railway Company to accept the transfer of the said undertaking, unless it shall have been proved to the satisfaction of the Commissioners of Railways, and certified by them under their seal, previously to the completion of such sale by transfer, that one-half of the whole amount of the capital, exclusive of loans by the Act or Acts relating to each of the said Companies authorised to be raised, has been actually paid up and expended for the pur-

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

Railway to Henby and to Radstock, to widen certain portions of the Great Western Railway, to enable the Great Western Railway Company to purchase or amalgamate with the Birmingham, Wolverhampton and Dudley Railway Company, and to purchase the Wycombe and Great Western Uxbridge Railways, and for other purposes," it was enacted, that, in citing that Act, it should be sufficient to use the expression, "The Great Western Railway Amendment and Extension Act, 1847." And it was further enacted, that all the provisions, matters, and things contained in the said several Acts relating to the Great Western Railway Company, so far as the same were unrepealed and in force, and were not inconsistent with or altered by the provisions of that Act, and save in so far as the same might be inconsistent with the provisions of the Lands Clauses Consolidation Act, 1845, and of the Railways Clauses Consolidation Act, 1845, should extend to that Act, and to the several purposes thereof, as fully and effectually as if the same provisions, matters, and things were repeated and re-enacted in that Act, and had specific reference thereto. [The case then set out sections 40, 41, 47, 48(a).]—By the 49th section

poses authorised by such Act or Acts respectively."

Sect. 28 enacts, "That it shall be lawful for the Birmingham, Wolverhampton and Dudley Railway Company, and for the Great Western Railway Company, to make and enter into any contracts or agreements relating to the sale of the said undertaking to the last-mentioned Company, or for otherwise working or using the said undertaking or any part thereof, for the maintenance and repair thereof or any part thereof, as the said Companies may respectively deem advisable, and subject to such terms and

conditions as may be mutually agreed on between them; and the said articles of agreement for sale of the said railway hereinbefore referred to, shall be as valid and binding, in every respect, as if the same had been made subsequently to the passing of this Act, and in conformity with the provisions thereof."

(a) Sect. 40. "And whereas an Act was passed in the last session of Parliament, called 'The Birmingham, Wolverhampton and Dudley Railway Act, 1846:' and whereas, by certain articles of agreement, bearing date the 12th day of November,

it was enacted, that the maximum rate of charge to be made by the Company for the conveyance of passengers

1850.

ATT.-GEN.

v.

GREAT
WESTERN
RAILWAY CO.

1846, and entered into between the directors of the Great Western Railway Company and the directors of the said Birmingham, Wolverhampton and Dudley Railway Company, and of the Birmingham and Oxford Junction Railway Company, and which agreement has been confirmed by the proprietors in the said three Companies respectively, at meetings specially convened for the purpose, it has been agreed, amongst other objects, and subject to the approval of Parliament, that the Great Western Railway Company shall be the purchasers of the undertaking authorised to be carried into effect by the said Birmingham, Wolverhampton and Dudley Railway Company; be it therefore enacted, that it shall be lawful for the Great Western Railway Company to purchase the said undertaking, as well as any works which the Birmingham, Wolverhampton and Dudley Railway Company may be authorised to carry into effect, or any undertaking which they may be authorised to purchase by any Act or Acts which may be passed in the present session of Parliament, together with all their rights, powers, privileges, and authorities in relation thereto; and it shall be lawful for the Great Western Railway Company to purchase, hold, use, exercise, and enjoy the same; and the agreement so entered into as afore-

said shall be binding on the Great Western and the Birmingham Wolverhampton and Dudley Railway Companies respectively."

Sect. 41 enacts, "That it shall be lawful for the Birmingham, Wolverhampton, and Dudley Railway Company, and they are hereby required, on demand made by the Great Western Railway Company, and on payment or tender by them of the price or consideration specified in the said articles of agreement, at the time and in manner therein mentioned, to transfer to the Great Western Railway Company the undertaking which they are by the said recited Act authorised to carry into effect, or which they may be authorised to carry into effect by any Act or Acts which may be passed in the present session of Parliament, and on completion of such transfer (of which completion a deed of transfer or conveyance, duly stamped for denoting the payment of the full and proper stamp duty by law payable in respect of the purchase money, and under the corporate seal of the said Birmingham, Wolverhampton and Dudley Railway Company, shall be sufficient evidence,) the Great Western Railway Company may have and hold the undertaking so transferred to them, and may use, exercise, and enjoy all the powers and privileges which the said Birmingham, Wolverhampton,

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

along the said railway, including the tolls for the use of the said railways and of carriages, and for locomotive

and Dudley Railway Company are or may be authorised or empowered to use, exercise, or enjoy in relation thereto."

Sect. 47. "And whereas two Acts were passed in the last session of Parliament, intituled respectively 'The Birmingham and Oxford Junction Railway Act, 1846,' and 'The Birmingham and Oxford Junction (Birmingham Extension) Railway Act, 1846,' by which Acts it was enacted that no lease or sale of such last-mentioned railways to the Great Western Railway Company, under the powers in the said Acts contained, should take effect unless and until the maximum tolls and charges on the said Great Western Railway should have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges authorised to be taken by the last-mentioned Act; and whereas a bill is now pending before Parliament for uniting the Birmingham and Oxford Junction Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company into one Company, and, amongst other objects, for authorising the sale of the said Birmingham, Wolverhampton, and Dudley Railway, and other new works to the Great Western Railway Company, by which bill it is also provided, that the sale of the said Birmingham, Wolverhampton, and Dudley

Railway to the Great Western Railway Company shall not take effect until the maximum tolls and charges on the said Great Western Railway have been reduced by Parliament in manner aforesaid; and whereas it is expedient that the tolls and charges on the said Great Western Railway should be reduced, in order that the purchase of the said railways by the said Great Western Railway Company shall take effect; be it therefore enacted, that the scale of tolls and charges by this Act authorised to be demanded and taken on the said Great Western Railway, shall be and be deemed and held to be the reduced scale referred to in the said Acts relating to the said Birmingham and Oxford Junction Railway, and in the said recited bill relating to the amalgamation of the said Birmingham and Oxford, and Birmingham, Wolverhampton, and Dudley Railway Companies, on the establishment whereof by Parliament the sale of the said undertakings respectively to the said Great Western Railway Company might lawfully take effect, and that from and after the transfer of the said undertakings, or any part thereof, to the said Great Western Railway Company, it shall not be lawful for the Great Western Railway Company to demand and receive, in respect of the use of the Great Western Railway and the Branch

power, and every other expense incidental to such conveyance as aforesaid, except Government duty, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the said schedule annexed hereto (a).—And with respect to the conveyance of goods, the maximum rates of charge to be made by the Company for the conveyance thereof along the said railways, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services, or any of them, were or was performed by the Company, should not exceed the sums therein specified and set forth, being the same sums as are in that behalf specified and set forth in the said schedule annexed hereto (b).

The bill in the last-mentioned Act stated to be pending before Parliament, for uniting the Birmingham and Oxford Junction Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company into one Company, and other objects, for authorising the sale of the Birmingham, Wolverhampton and Dudley Railway, and other

1850
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

Railways by this Act authorised to be made, by parties using the same, either with their own carriages and engines employed by them thereon, or with their own engines only (in cases where the Company as hereinafter provided may consent to supply carriages), any tolls and charges exceeding the tolls and charges following:” (Then follows a scale of charges.)

Sect. 48 enacts, “That the toll

which the Company may demand for the use of engines for propelling the carriages of other parties on the said railways shall not exceed one penny per mile for each passenger or animal, or for each ton of goods or other articles, in addition to the several other tolls or sums by this Act authorised to be taken for the use of the said railways.”

(a) See post, p. 539, note.

(b) See post, p. 540, note.

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

new works, to the Great Western Railway Company, did not pass into a law. [The case then set out the 11 & 12 Vict. c. lxxiv. "The Great Western Railway, Berks, and Hants Extension Act, 1848," ss. 24, 25, 26, 30; the 11 & 12 Vict. c. cxxxv. "The Great Western Railway (Slough and Windsor) Act, 1848," ss. 38, 39, 40; and the 11 & 12 Vict. c. clix. "An Act to confer additional powers on the Great Western Railway Company, with reference to an agreement of the 12th November, 1846, for the purchase by them of the Birmingham and Oxford Junction, and Birmingham, Wolverhampton and Dudley Railways," ss. 1, 2, 3, 4, 5, 10, 14, 18; but as the judgment of the Court did not proceed with reference to these enactments, it is considered unnecessary to state them.]

The sale to the Great Western Railway Company of the Birmingham and Oxford Junction Railway, or of the Birmingham, Wolverhampton and Dudley Railway, mentioned or referred to in the 47th section of the "Great Western Railway Amendment and Extension Act, 1847," has not yet been completed, nor have nor has the said two last-mentioned undertakings, or either of them, or any part thereof respectively, been transferred to the Great Western Railway Company, or completed and opened to the public; nor has any portion of the purchase money for the same been paid, nor has one-half of the whole amount of the capital mentioned or referred to in the 25th section of the "Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847," exclusive of the loans in the same section respectively mentioned or referred to, been paid up or expended for the purposes authorised by the Act or Acts in the same section mentioned or referred to, nor has any certificate of such payment or expenditure been given by the Commissioners of Railways, nor has one-half of the whole amount of the capital, exclusive of loans authorised to be raised by the Act or Acts relating to the Great Western Railway Company, and the Birmingham, Wolverhampton and Dudley

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY Co.

Railway Company, been paid up or expended for the purposes mentioned or referred to in the 46th sect. of the Great Western Railway Amendment and Extensions Act, 1847, nor has any certificate of such last-mentioned payment or expenditure been given by the Commissioners of Railways; and the Great Western Railway Company have not at the present time in their hands monies sufficient for the completion of the purchase, either of the Birmingham and Oxford Junction Railway, or of the Birmingham, Wolverhampton and Dudley Railway; and such monies will have to be raised and provided either by the creation of new shares or by the taking up of money on loan.

Ever since the passing of the Acts respectively intituled "The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 1847," and "The Great Western Railway Amendment and Extensions Act, 1847," the Great Western Railway Company have continued to charge and receive, and they do now charge and receive, for the conveyance of passengers and goods along the said Great Western Railway, rates of charges exceeding the said rates mentioned and set forth in the schedule hereto annexed (a), but not ex-

(a) The schedule was as follows:—"For the conveyance of passengers along the said railways as aforesaid, including the tolls for the use of the said railways and of carriages, and for locomotive power, and every other expense incidental to such conveyance as aforesaid, except government duty, shall not exceed the following sums; (that is to say)—

"For every passenger conveyed in a first-class carriage by an express train, the sum of 2½d. per mile.

"For every passenger conveyed in a second-class carriage by

any express train, the sum of 1½d. per mile.

"For every passenger conveyed in a first-class carriage by any other train, the sum of 2d. per mile.

"For every passenger conveyed in a second-class carriage by any such other train, the sum of 1½d. per mile.

"For every passenger conveyed in a third-class carriage by any such other train, the sum of 1d. per mile.

"And with respect to the conveyance of goods, the maximum rates of charge to be made by the Company for the conveyance

1850.

ATT.-GEN.

v.

GREAT
WESTERN
RAILWAY CO.

ceeding the rates authorised to be taken under the three firstly-mentioned Acts.

thereof along the said railways, including the tolls for the use of the said railways and wagons or trucks, and locomotive power, and every expense incidental to such conveyance, except a reasonable sum for loading, covering, and unloading of goods, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are or is performed by the same Company, shall not exceed the following sums: (that is to say)

"For every horse, mule, and other beast of draught or burden, 3*d.* per mile.

"For horned cattle, the sum of 1½*d.* per head per mile.

"For calves, pigs, sheep, and small animals, ½*d.* each per mile.

"For every private carriage, 4*d.* per mile.

"For all coal, coke, ironstone, and other articles hereinbefore classed therewith, conveyed any distance not exceeding fifty miles, the sum of 1½*d.* per ton per mile; and the sum of ¾*d.* per ton per mile, for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For all dung, compost, and other articles hereinbefore classed therewith, conveyed any distance not exceeding fifteen miles, the sum of 1½*d.* per ton per mile; and the sum of 1½*d.* per ton per

mile for the whole distance travelled, if conveyed a distance exceeding fifteen miles.

"For all sugar, grain, and other articles hereinbefore classified therewith, conveyed any distance not exceeding fifty miles, the sum of 2½*d.* per ton per mile; and the sum of 2*d.* per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For all cotton and other articles hereinbefore classified therewith, conveyed any distance not exceeding fifty miles, the sum of 3*d.* per ton per mile; and the sum of 2½*d.* per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"For fish and all other wares, merchandise, articles, matters, and things, conveyed any distance not exceeding fifty miles, the sum of 3½*d.* per ton per mile; and the sum of 3*d.* per ton per mile for the whole distance travelled, if conveyed a distance exceeding fifty miles.

"Where any such articles, matters, or things, are carried a distance exceeding fifteen or fifty miles respectively, as above provided, the Company are empowered to demand and receive, at the least, the rates of charge above specified, as for fifteen or fifty miles respectively."

The question for the opinion of the Court is, whether the Great Western Railway Company are entitled by law to charge and receive, for the conveyance of passengers and goods along the said Great Western Railway, any rates of charge exceeding the rates mentioned and set forth in the schedule hereunder written, save in respect of passengers and goods conveyed on the Great Western Railway for short distances, or by special or extra trains, or in respect of fractional distances or weights, or the carriage of small packages or articles of great weight, or in cases of special agreement.

1850.
 }
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY Co.

The *Attorney-General* (*Welsby* with him) argued for the Crown (May 29 and 31).—The effect of the several statutes set forth in the case, and particularly of the 10 & 11 Vict. c. cxlix. and 10 & 11 Vict. c. ccxxvi. is to impose on the Great Western Railway Company a maximum rate of toll for passengers and goods, which they have exceeded. The Company was originally constituted by the 5 & 6 Will. 4, c. cvii. which received the Royal Assent on the 31st of August, 1835. By the 164th section they are authorised to take certain rates of tonnage on goods. The 165th section provides for toll in respect of passengers and cattle. The 166th section empowers the Company to charge for locomotive power. The 167th section enables them to carry passengers, cattle, and goods, and to charge for such conveyance, in addition to the rates or tolls authorised to be taken, provided the charge for passengers does not exceed threepence halfpenny per mile, including the rate or toll. The 6 Will. 4, c. xxviii. made no alteration in the toll. By the 64th section of the Birmingham and Oxford Junction Railway Act, 9 & 10 Vict. c. cccxxxvii. (which received the Royal Assent on the 3rd August, 1846), the maximum rate of charge for passengers is limited to twopence halfpenny per mile. The 65th section relates to the maximum charges for goods. The 68th and 69th sections empower that Company to lease or sell their railway to the Great Western Railway Compa-

1850.
 ATT. GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

ny; but the 70th section expressly provides that no lease or sale shall take effect, "unless and until the maximum tolls and charges on the Great Western Railway shall have been reduced by Parliament to the same scale as, or to a scale not exceeding, the tolls and charges of the Birmingham and Oxford Junction Railway." That section, read in contrast with the 10 & 11 Vict. c. cxxvi. affords a key to its construction. By the Act for extending the Birmingham and Oxford Junction Railway to Birmingham, 9 & 10 Vict. c. cccxxxviii. (which also received the Royal Assent on the 3rd August, 1846), the tolls are to be the same as those on the Birmingham and Oxford Junction Railway, (section 35). The 36th and 37th sections confer a similar power to lease or sell the railway to the Great Western Railway; and the 38th section, in like manner, provides that no lease or sale shall take effect until the rates on the Great Western Railway are reduced. The Birmingham, Wolverhampton and Dudley Railway Act, 9 & 10 Vict. c. cccxv. limits the maximum rate of charge for passengers and goods to twopence halfpenny per mile, (section 34); but that Act contains no power to lease or sell the railway. The Birmingham, Wolverhampton and Dudley Railway Amendment Act, 10 & 11 Vict. c. cxlix. (which received the Royal Assent on the 9th of July, 1847), by section 24, after reciting the agreement between the directors of the Great Western Railway Company and the directors of the Birmingham and Oxford Junction Railway Company, and of the Birmingham, Wolverhampton and Dudley Railway Company, for the purchase of those two lines by the Great Western Railway Company, empowers them and the Birmingham, Wolverhampton and Dudley Railway Company to carry it into effect; but by the 25th section, the power of sale is not to be exercised without a certificate from the Railway Commissioners, that one-half of the capital has been actually paid up. That statute, however, contains no provision that the sale shall not take effect until the rates on the Great Western Railway are reduced. The

13th section empowers the Great Western Railway Company "to demand tolls for the use of the Great Western Railway, or of the Birmingham, Wolverhampton and Dudley Railway." The 15th section prescribes the maximum charge "for the conveyance of passengers along the said railways as aforesaid." The 28th section empowers the two Companies to make contracts in respect of the sale of the Birmingham, Wolverhampton and Dudley Railway; and the 29th section empowers the Great Western Railway Company to hold shares in the other railway. There is no allusion to anything to be done by the Great Western Railway Company *prospectively*, but throughout the statute they are treated as if they had actually completed the purchase of the other lines. The 24th section does not attach any condition to the positive enactments of the 13th and 15th sections, but only enables the Great Western Railway Company to do what the Birmingham, Wolverhampton, and Dudley Railway Company might have done under the 9 & 10 Vict. c. cccxv. The 10 & 11 Vict. c. cccxvi., which had reference entirely to the Great Western Railway Company, by section 40, which recites the agreement, empowers that Company to purchase the Birmingham, Wolverhampton and Dudley Railway. The 41st section contemplates the completion of the sale by a deed of conveyance; thus treating the *contract* as perfected. The 47th section does not repeal the 64th section of the 9 & 10 Vict. c. cccxxvii., but limits the maximum charge for passengers conveyed on the Great Western Railway and its branches to twopence per mile.

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY Co.

Peacock (*F. Stevens* with him) for the defendants.—Reading these statutes as one entire code, the Great Western Railway Company are not restricted from taking the toll originally authorised by the 5 & 6 Will. 4, c. cvii. until the purchase by them of the Birmingham and Oxford Junction Railway, and of the Birmingham, Wolverhampton and Dudley Railway, is finally completed. By the 70th sect. of the 9 &

1850.
 {
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

10 Vict. c. cccxxxvi. the Great Western Railway Company must obtain an Act of Parliament to reduce the maximum of their toll to the same scale as the maximum toll of the Birmingham and Oxford Junction Railway before the sale of that railway can take effect. The 10 & 11 Vict. c. cxlix. passed after the agreement for the purchase by the Great Western Railway Company of the two other lines; but that statute does not treat the Birmingham, Wolverhampton and Dudley Railway Company as already amalgamated with the Great Western; for it enables the former to raise additional capital by the creation of new shares: (Sections 4, 5). The meaning of the 13th and 15th sections is, that after the two Companies are amalgamated the Great Western shall not take any tolls exceeding the prescribed amount; but they are not to interfere with the tolls of the Birmingham, Wolverhampton and Dudley Railway, until the purchase is complete. The maximum clause (section 15) comes by way of proviso to the two previous sections, and was not intended to operate until they took effect. That such is the true construction is evident from the 47th section of the 10 & 11 Vict. c. cccxxvi.

The Attorney-General replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a case for the purpose of deciding whether the Great Western Railway Company are bound to reduce their tolls on the main line to the scale fixed by the Act of Parliament for the Birmingham and Oxford Junction Railway.

By the original Great Western Railway Act, 5 & 6 Will. 4, c. cvii. ss. 164, 167, and by 6 & 7 Will. 4, c. xxxviii. and 1 Vict. c. xcii. the Company are authorised to take certain tolls. The Company have ever since taken and still

take the tolls authorised by those Acts. The question is, whether any statute that has since passed prevents them from continuing to do so.

By two Acts which received the Royal Assent on the 3rd of August, 1846, that is, the 9 & 10 Vict. c. cccxxxvii. and the 9 & 10 Vict. c. cccxxxviii. a new Company was created, called "The Birmingham and Oxford Junction Railway Company," and the tolls authorised by those Acts were less than those of the Great Western Railway Company. By those Acts power was given to the Great Western Railway Company to purchase the Birmingham and Oxford Junction line (see ss. 69 and 70, of the former Act, and ss. 37 and 38, of the latter), provided that no such sale should take effect unless and until the toll on the Great Western line shall have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. On the same 3rd of August, 1846, another Act received the Royal Assent, 9 & 10 Vict. c. cccxv. called "The Birmingham, Wolverhampton and Dudley Railway Act," whereby a new Company was formed for making a railway from Birmingham through Wolverhampton to Dudley, and that Company was authorised to receive the same tolls as were to be taken by the Birmingham and Oxford Railway Company. This Act contained no power of sale to the Great Western Railway. By articles of agreement, dated the 12th of November, 1846, entered into by the directors of the Great Western Railway Company, the directors of the Birmingham and Oxford Railway Company, and the directors of the Birmingham, Wolverhampton and Dudley Railway Company, the two latter sets of directors agreed to sell to the Great Western Railway Company, and the Great Western Railway Company agreed to purchase, the Birmingham and Oxford line, and the Birmingham, Wolverhampton and Dudley line, upon certain terms specified in the agreement.

It must be observed, that this contract, so far as relates

1850.
ATT.-GEN.
v.
GREAT
WESTERN
RAILWAY Co.

1850.
 ATT. GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

to the Birmingham and Oxford line, had been authorised by the 9 & 10 Vict. c. cccxxxii.; but as to the Birmingham, Wolverhampton and Dudley Railway there was not, at the date of the contract, any *parliamentary authority* to make it. This authority, however, was given by an Act passed in the next session, 10 & 11 Vict. c. cxlix. called "The Birmingham, Wolverhampton and Dudley Amendment Act." By section 24, the contract of the 12th of November, 1846, is there recited, and power is given to the Great Western Railway Company, and the Birmingham, Wolverhampton and Dudley Railway Company, to carry it into effect; but by section 25, no sale to the Great Western Railway Company is to be made until a certificate has been obtained from the Railway Commissioners, that one half of the capital has been duly paid up. By this Act it is provided (sections 13, 14 & 15) that the Great Western Railway Company may demand for the use of the Great Western Railway Company, or of the Birmingham, Wolverhampton and Dudley Railway, the tolls therein enumerated, being a scale of toll materially less than those of the original Great Western Railway Acts, but not precisely the same as those contained in the Birmingham and Oxford Acts. By section 15, certain sums are fixed as the maximum to be taken by the Great Western Railway Company, for the conveyance of passengers, cattle, and goods along *the said railways*, that is, along the Great Western Railway, and the Birmingham, Wolverhampton and Dudley Railway.

The only other Act to which it appears to us material to refer is the 10 & 11 Vict. c. ccxxvi., which received the Royal Assent on the 2nd of July, 1847. That was an Act for enabling the Great Western Railway to make certain branch lines, and to purchase the Birmingham, Wolverhampton and Dudley Railway, and for other purposes; and by section 41 the last-named Company are again authorised to sell their railway to the Great Western Company, and, on tender to them by the Great Western Company of the

purchase-money, are required to execute a proper conveyance; and by section 47, it is enacted (inter alia) that the reduced scale of tolls therein contained (and which is precisely the same as that contained in the Act of the same session, 10 & 11 Vict. c. cxlix. being the Birmingham, Wolverhampton and Dudley Act), should be deemed and taken to be the reduced scale referred to in the Birmingham and Oxford Junction Act, the 9 & 10 Vict. c. cccxxxvii.

The result of these acts is, that, by the 9 & 10 Vict. c. cccxxxvii. the Great Western Railway Company were empowered to purchase the Birmingham and Oxford line, their own tolls on the Great Western line being first reduced by Act of Parliament to a scale not exceeding that of the Oxford line. By the 10 & 11 Vict. c. cxlix. the Great Western Railway Company were empowered to purchase the Birmingham, Wolverhampton and Dudley line, and to take on that line and their own original line a reduced scale of tolls not precisely the same as that of the Birmingham and Oxford scale; and there was in that Act, as in the other Acts, a maximum clause, that is, a clause limiting the sum which the Company could take for the railway, and for the supply of locomotive power, and the use of carriages, and so on.

The *Attorney-General* contended, that immediately after the passing of this Act, the Great Western Railway Company were precluded from taking on their own line more than the reduced toll. But we are clearly of opinion that this is not the true construction of the Act. The reduction of toll was clearly only to take effect when the purchase of the Birmingham, Wolverhampton and Dudley line was completed. Under any other construction, the Great Western Railway Company would be at liberty to take tolls on the Birmingham, Wolverhampton and Dudley Railway before it belongs to them, and while the Birmingham, Wolverhampton and Dudley Railway Company may be themselves using and taking tolls on it for their own purposes; which

1850.
ATT.-GEN.
v.
GREAT
WESTERN
RAILWAY Co.

1850.
 ATT.-GEN.
 v.
 GREAT
 WESTERN
 RAILWAY CO.

appears to us a manifest absurdity. Then follows the Act 10 & 11 Vict. c. ccxxvi. which substitutes the scale provided by the 10 & 11 Vict. c. cxlix. for the Birmingham and Oxford scale, making the scale to be taken on completing of both lines, that is, the Birmingham and Oxford line, and the Birmingham, Wolverhampton and Dudley line, the same; so that when either of the purchases shall have been finally effected, the scale of tolls to be taken by the Great Western Railway Company, as well on their original as on the purchased line or lines, will be the reduced scale; but until the purchase of one or both of the lines has been effected, the right of the Great Western Railway Company to take the tolls authorised by their original Act remains unaffected. Our certificate will, therefore, be for the defendants.

A certificate in conformity with the above opinion was afterwards sent to the Vice-Chancellor.

June 12. In the Matter of the LAND TAX ASSESSMENT for the HOLBORN DIVISION of the County of MIDDLESEX.

The Court of Exchequer has no jurisdiction to order the Commissioners of Land Tax to cause the proportion charged upon a division to be equally assessed.

THIS was a rule calling on the Commissioners of Land Tax for the Holborn Division of the County of Middlesex to shew cause why they should not meet and cause the proportion charged upon that division, for and towards the land tax for the current year, to be equally taxed and assessed within such division, and within every parish and place therein.

The rule was obtained on behalf of certain persons rated to the land tax within that division; and the affidavits in support of it stated that the proportion assessed on the Holborn division, towards the sum to be raised in the county of Middlesex, is 13,629*l.* 13*s.* 5*d.* That the amount of land

tax redeemed in that division is 2846*l.* 10*s.* 3*d.*, which leaves 10,783*l.* 3*s.* 2*d.* to be raised as such proportion. That the Holborn division consists of the United Parishes of St. Andrew Holborn and St. George the Martyr, the Liberty of the Rolls, the Parish of St. Marylebone, the Parish of St. Pancras, the Parish of St. John, Hampstead, and the Parish of Paddington. That the annual value of the property now rateable in the said parishes to the land tax is as follows:—St. Andrew and St. George, 158,807*l.*; the Liberty of the Rolls, 9160*l.*; St. Marylebone, 910,680*l.*; St. Pancras, 186,104*l.*; St. John, Hampstead, 11,296*l.*; Paddington, 8885*l.*: making together 1,284,332*l.* That on the 19th April last, the commissioners taxed and assessed, upon the United Parishes of St. Andrew and St. George, towards the said proportion of 13,629*l.* 13*s.* 5*d.*, the sum of 9018*l.* 13*s.* 4*d.*, giving credit for 11,181*l.* 10*s.* 6½*d.*, being the amount of land tax redeemed, leaving 7837*l.* 2*s.* 9½*d.* to be raised, which required a rate of 1*s.* in the pound; upon the Parish of St. Pancras, the sum of 1399*l.* 5*s.* 2*d.*, giving credit for 394*l.* 11*s.* 4½*d.*, being the amount redeemed, leaving 1004*l.* 13*s.* 9½*d.* to be raised, which required a rate of ½*d.* in the pound; upon the Parish of St. John, Hampstead, 855*l.* 17*s.* 4*d.*, giving credit for 565*l.* 1*s.* 8*d.*, the amount redeemed, leaving 299*l.* 15*s.* 8*d.* to be raised, which required a rate of 6½*d.* in the pound; upon the Parish of Paddington, the sum of 354*l.* 6*s.* 10*d.*, giving credit for 254*l.* 19*s.* 2¼*d.*, the amount redeemed, leaving 109*l.* 7*s.* 7¼*d.* to be raised, which required a rate of 3½*d.* in the pound; upon the Parish of St. Marylebone, 564*l.* 5*s.* 1*d.*, giving credit for 90*l.* 7*s.* 9*d.*, the amount redeemed, leaving 473*l.* 17*s.* 4*d.* to be raised, which required a rate of half a farthing in the pound. That no assessment had yet been made for the current year in respect of the Liberty of the Rolls. The affidavits also stated, that the applicants had required the commissioners to assess them in respect of their property at and after an equal pound rate to be assessed on the annual value of all

1850.
In re
HOLBORN
LAND TAX
ASSESSMENT.

1850.
 {
In re
 HOLBORN
 LAND TAX
 ASSESSMENT.

the property rateable to the land tax within the Holborn division, but the commissioners refused to do so. That if the amount directed to be raised was equally taxed and assessed throughout that division, the same might be raised by a rate of five farthings in the pound.

The *Attorney-General* shewed cause.—There is no precedent for this application. The only authorities on the subject are the case of *The Commissioners of the Westminster Land Tax* (a), and *Lord Aylesford's Case* (b); but they bear no analogy to the present case. In the former, the Commissioners had refused to levy the full quota upon the several divisions, in proportion to the sums assessed upon them respectively, by the 4 W. & M. In the latter case, the object of the application was to compel the Commissioners of Land Tax for the Hundred of East Goscote, in the county of Leicester, to transmit into the Queen's Remembrancer's Office duplicates of the sum assessed on each parish within that hundred. In this case the total amount of the assessment has been levied; and the application is in the nature of an appeal against the judgment and discretion of the Commissioners, as to the mode of apportioning the quota charged on the division in question. [*Pollock*, C.B.—If we are to entertain this application, there seems no reason why we should not interfere with the Commissioners of the Income Tax or Assessed Taxes.]

The Court then called on

Peacock and *S. Miller* to support the rule.—The Court is only prevented from interposing where the jurisdiction of the Commissioners is final. In the case of *The Commissioners of the Westminster Land Tax*, this Court ordered the Commissioners to alter the quotas assessed by them on

(a) *Parker*, 74.

(b) This case is not reported, but was cited from the "Appendix to Minutes of Evidence be-

fore a Select Committee of the House of Lords on the Burdens affecting Real Property," p. 44.

particular parishes, and the same was done in *Lord Aylesford's case*. [Pollock, C.B.—If the Commissioners had omitted to assess any parish division or, or had charged any parish or division with a wrong sum, we might call on them to amend their return, and do justice by making the return correspond in amount with the sum required by the Act of Parliament to be levied. That seems to me all that the case of *The Commissioners of the Westminster Land Tax* imports. With respect to *Lord Aylesford's case*, at the time that was decided, the Commissioners of Land Tax were required by the 38 Geo. 3, c. 5, s. 8, to transmit a schedule of their assessments to the office of the Queen's Remembrancer; and assuming that decision to be correct, the foundation of the authority which the Court exercised was this, that the Commissioners being bound to deliver these public documents into the office of this Court as master of the revenue, it was the duty of the Court to see that the returns were correct. But now the duplicates are transmitted to the Commissioners of Stamps and Taxes, under the provisions of the 5 & 6 Will. 4, c. 20, s. 14.] That statute has not deprived this Court of its power to interfere where the Commissioners have neglected or exceeded their duty. The 38 Geo. 3, c. 5, s. 8, requires the Commissioners to cause the several proportions charged on the several hundreds or other divisions, (in the manner directed by the 7th section) to be *equally taxed and assessed* within every such hundred and other division, and within every parish and place therein, according to the best of their judgment and discretion. So that this is not a mere question between the individual ratepayers, whether the assessment is right or wrong, but whether the Commissioners have placed themselves in a situation which authorises them to collect the tax. This case differs from that of an improper assessment under the Income Tax Act, because there the party grieved may appeal. [Pollock, C.B.—Suppose the Income Tax Commissioners made no assessment what-

1850.

In re
HOLBORN
LAND TAX
ASSESSMENT.

1850.
 In re
 HOLBORN
 LAND TAX
 ASSESSMENT.

ever?] If the tax could not be collected, this Court would compel them to perform their duty. In *Lord Aylesford's case* the jurisdiction which the Court exercised was not merely with reference to the duplicates, but also to an equality of assessment.

POLLOCK, C. B.—There does not appear to be any precedent for such an application as this, and I am not disposed to assume a jurisdiction never before exercised.

ROLFE, B.—The rule calls on the Commissioners to shew cause why they should not cause the proportion charged upon the Holborn division of the county of Middlesex to be equally taxed and assessed within such division. The answer is, that they have done that according to what they think right, and their judgment is final.

PLATT, B., concurred.

Rule discharged, with costs (a).

(a) In *Ex parte Pym, in re The Land Tax Commissioners*, Q. B., Jan. 30, 1851, it was held that there was no remedy by *mandamus* to Land Tax Commissioners to make such equal assessment.

Exchequer Reports.

TRINITY VACATION, 14 VICT.

LOWE v. ROSS.

1850.
June 20.

DEBT for the use and occupation of a house and premises. Plea, never indebted. Issue thereon.

At the trial, before *Maule, J.*, at the last Summer Assizes for the county of Surrey, it appeared that the defendant had taken the premises from the plaintiff under a lease for a year; but it was objected on the part of the defendant, that the facts did not amount to an entry by the defendant upon the premises, and therefore that he was not liable in this form of action. The learned Judge was inclined to be of that opinion, and it was then contended for the plaintiff that an entry was not necessary. The learned Judge, however, nonsuited the plaintiff, reserving leave to him to move to set that nonsuit aside, and to enter a verdict for him, if the Court should be of a different opinion.

An action for use and occupation, under the stat. 11 Geo. 2, c. 19, s. 14, does not lie where there has not been an actual entry by the lessee.

Shee, Serjt., having obtained a rule nisi accordingly,

Dowdeswell (Montagu Chambers with him) now shewed cause.—The only point reserved at the trial was, whether an action for use and occupation under the statute 11 Geo. 2, c. 19, s. 14, can be maintained, without an actual entry upon the premises demised. It is perfectly clear upon the

1850.

LOWE
v.
ROSS.

authorities that an entry is necessary to support the action.

The Court then called upon

Shee, Serjt., and *Bovill* to support the rule (a).—An actual entry is not necessary. The 14th section provides that “it shall be lawful for the landlord and landlords, where the agreement is not by deed, to recover a reasonable satisfaction for the lands, tenements, or hereditaments held or occupied by the defendant or defendants, in an action on the case for the use and occupation of what was so held and enjoyed.” The defendant here held the premises from the date of the lease; and according to the authority of *Pinero v. Judson* (b), actual occupation is not necessary, but legal possession alone is sufficient, although the rule is different where there is a future demise: *Wooley v. Watling* (c). In the recent case of *Atkins v. Humphrey* (d), *Tindal*, C. J., in observing upon the language of the 14th section, says, “As far, therefore, as the letter of the Act goes, the words being in the alternative, ‘held or enjoyed,’ there is no necessity that the land should be occupied as well as held;” and the learned Chief Justice proceeds, “One may conceive cases of land taken, *but not entered upon*: in such a case, there is no reason why the party so taking, inasmuch as he keeps another from the occupation, should not be liable under the statute.” [*Parke*, B.—That dictum is certainly at variance with the cases of *Nation v. Tozer* (e), and *Edge v. Strafford* (f), in the latter of which it was expressly held that an entry is necessary. The effect of the lease is to create an *interesse termini* in the lessee, but he has nothing in the *land* until entry; no doubt an action would lie on the agreement, but the statute applies only to cases where there has been

(a) They contended in the first instance, that, in point of fact, there had been an entry; but the Court said that point was not open to them.

(b) 6 Bing. 206.

(c) 7 C. & P. 610.

(d) 2 C. B. 654.

(e) 1 C. M. & R. 172.

(f) 1 C. & J. 391.

1850.

LOWE
v.
ROSS.

an enjoyment, the words being "held and enjoyed." [*Al-
derson*, B.—The question in *Athyns v. Humphrey* turned
upon the meaning of the word *held* upon general demurrer,
and that word would of necessity imply an entry. *Parke*, B.
—The defendant there could not properly be said to have
held the land, unless he had entered upon it, as appears by
the language of Mr. Justice *Bayley* in *Edge v. Strafford*.]
It would seem, from the case of *Smith v. Twoart*(a), that
an entry is not necessary. *Erskine*, J., there said, "When
a party takes premises, and has an opportunity to occupy,
the mere fact that he does not occupy them does not de-
prive the landlord of his remedy by this form of action."
[*Platt*, B.—It was there held, that there was some evidence
for the jury of the defendant's possession.] Where the assign-
ment is to take effect instantan, the doctrine of *interesse ter-
mini* does not arise: *Bellasis v. Burbriche* (b). In *Williams*
v. Bosanquet (c), it was held, that when a party takes an
assignment of a lease by way of mortgage, the whole in-
terest passes to him, and he becomes liable upon the cove-
nant for payment of rent, though he has never occupied or
become possessed in fact.

PARKE, B.—The only question in the present case which
was reserved for discussion by my Brother *Maule* is, whe-
ther the defendant is liable for use and occupation, not hav-
ing entered upon the demised premises; for I assume that
my Brother *Maule* was satisfied that there was a complete
lease for a year to take effect in *præsenti*, and also that
there was no actual entry; for if it had been questionable
whether the facts relied upon by the plaintiff amounted to
an entry, a request should have been made to the learned
Judge by the plaintiff's counsel, that the question should be
left to the jury. But upon the facts of this case we must
assume that no entry was proved. Now, I have always
considered that *Edge v. Strafford*, followed by other cases,

(a) 3 Scott, N. R. 172. (b) 1 Ld. Raym. 170. (c) 1 B. & B. 238.

1850.

LOWE

v.
1028.

had laid down the law expressly, that an action for use and occupation could not be maintained until after entry by the lessee. That case was followed by *Hov v. Kennett*(a), where it was held, that an action for use and occupation cannot be maintained against a trustee to whom the term has been assigned by the termor, unless he has actually occupied; although the assignment be sufficient to vest the term in the trustee, unless he disclaims. *Littledale, J.*, there says, "I agree with Mr. *Manning* that an assignment at common law charges the assignee with the premises, unless he disclaims. But the question here is, whether an action for use and occupation lies." And then he adds, "Perhaps an action of debt might lie, the declaration stating that the term was assigned to the defendants; but in an action for use and occupation it must be shewn that the defendants in fact occupied." The same law is laid down in *Nation v. Tozer*. Against these decisions there is nothing to be found but the dictum of *Tindal, C. J.*, in *Atkins v. Humphrey*, which I may observe was unnecessary for the decision of the case, for the executors there were liable as assignees. The other Judges in that case say nothing of the sort. I have always considered no point of law to be clearer than this—that in actions of debt or covenant on a lease to recover rent, although the declaration usually contains a statement that the lessee had entered, the averment need not be proved; but when the question is, whether the estate has vested, then proof of an actual entry is necessary. The statute may apply to cases in which the relation of landlord and tenant does not exist; but where the case is put, as it is here, on a supposed lease between the parties, it is essential to shew that the lessee has entered, before the landlord can maintain an action for use and occupation. The rule, therefore, ought to be discharged.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged.

(a) 3 A. & E. 659.

1850.

July 8.

WILES v. WOODWARD.

TROVER for reams of paper.—Pleas, not guilty and not possessed.

At the trial before *Patteson, J.*, at the Yorkshire Summer Assizes, 1849, it appeared that the plaintiff and defendant had carried on business in partnership as paper manufacturers and iron merchants, and that the partnership was dissolved by a deed, dated the 14th of February, 1844, which, so far as material, is as follows:—"Whereas the property belonging to the said Joshua Woodward (the defendant) and William Wiles (the plaintiff), in respect of their partnership in the said businesses, consists of a leasehold paper-mill, called "The Olive Mill," in the chapelry of Bradfield, &c., and of the goodwill, stock in trade, and machinery of the said business of paper manufacturers carried on upon the said premises, and also of book debts due and owing unto the said J. Woodward and W. Wiles in respect thereof, and the leasehold warehouses situate in Joiner-lane, in Sheffield, and of the goodwill, stock in trade, and effects of the business of iron merchants carried on upon the said premises, and also of book debts due unto the said J. Woodward and W. Wiles in respect thereof. And whereas, as part of the arrangement for the said dissolution of partnership, it hath been agreed that the said leasehold paper-mill, and the goodwill, stock in trade, and machinery

In trover for paper, it appeared, that the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper manufacturer should belong exclusively to the defendant, and the business of an iron merchant to the plaintiff, but that the plaintiff should receive out of the stock, paper to the value of 898*l.* 4*s.* 11*d.*, which should remain in the paper mill for a year, at his option. The deed also re-

cited, that in performance of that arrangement *paper to the value of 898*l.* 4*s.* 11*d.* had been delivered to the plaintiff*, and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed, that in performance of the arrangement the plaintiff and defendant dissolved partnership, and the plaintiff assigned to the defendant the stock in trade of the business of a paper manufacturer, except the 898*l.* 4*s.* 11*d.* worth of paper *so delivered to the plaintiff as aforesaid*, and the defendant assigned to the plaintiff the stock in trade of the business of iron merchants: there were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock:—*Held*, first, that the parties were estopped by the deed, to say that no such delivery had taken place; secondly, that as the defendant had converted the whole, the plaintiff might maintain trover for his share of the stock, although no specific portion had been set apart for him.

1850.
WILES
v.
WOODWARD.

of the said business of a paper manufacturer, and also the book debts of, belonging, due, or owing or relating to both the said businesses, shall be taken by and belong exclusively to the said J. Woodward, and that the said leasehold warehouse, and the goodwill, stock in trade, and effects (excepting the book debts) of the said business of an iron merchant, shall be taken by and belong exclusively to the said W. Wiles; but that inasmuch as the property to be so exclusively taken by the said J. Woodward on such dissolution exceeds in value the said property to be so taken by the said W. Wiles exclusively, it was further agreed that the said W. Wiles should receive out of the stock in trade of the said business of a paper manufacturer, paper to the value of 898*l.* 4*s.* 11*d.*, which should remain upon the premises of the said mill for the term of one year or not, at the option of the said W. Wiles, who should pay the excise duty thereon. And whereas it is also intended and agreed, that the said leasehold paper-mill shall be forthwith assigned to, and be absolutely and exclusively vested in, the said J. Woodward, his executors and administrators; and also, that the said leasehold warehouse and premises in Joiner-lane, in Sheffield, aforesaid, whereon the said business of an iron merchant was carried on as aforesaid, shall be forthwith assigned to, and be absolutely and exclusively vested in, the said W. Wiles, his executors, &c.; and whereas, in further performance of the said arrangement, *paper to the value of 898*l.* 4*s.* 11*d.* hath been delivered to the said W. Wiles, and the same is now in and upon the said mill and premises, as he doth hereby acknowledge.* Now this indenture witnesseth, that in pursuance and further performance of the said arrangement, they the said J. Woodward and W. Wiles do, and each of them doth, by these presents dissolve, determine, and put an end to the partnership which so formerly subsisted between them the said J. Woodward and W. Wiles, in the said business of paper manufacturers and also in the said business of iron merchants, and in all dealings and transactions connected with or relating to the said respective busi-

1850.
 WILES
 v.
 WOODWARD.

nesses or any of them; and this indenture further witnesseth, that, in pursuance and further performance of the said arrangement, he the said W. Wiles doth, by these presents, assign, release, and transfer unto the said J. Woodward, his executors, &c., all and singular the stock in trade, goods, fixtures, implements, and articles of or belonging to or used in the said trade or business of paper manufacturers, heretofore carried on in co-partnership by the said J. Woodward and W. Wiles (other than and except the said sum of 898*l.* 4*s.* 11*d.* worth of paper *so delivered to the said W. Wiles as aforesaid*; and also all the goodwill, benefit, and advantage of the said business, and all debts due to them the said J. Woodward and W. Wiles, or either of them, in respect or on account of the said businesses of paper manufacturers and iron merchants respectively (so hitherto carried on in partnership by them); and all books of accounts, invoices, vouchers, and documents relating to the said businesses of paper manufacturers and iron merchants respectively, or to the dealings and transactions of the said J. Woodward and W. Wiles therein, and all the right, title, interest, trust, property, benefit, claim and demand whatsoever or howsoever of him the said W. Wiles, of, in, to, out of, or upon the said stock in trade, goods, effects, goodwill, debts, and premises, hereinbefore assigned and released or intended so to be." The deed contained a similar assignment by J. Woodward to W. Wiles, "of the stock in trade, goods, fixtures, implements, and articles of or belonging to or used in the said trade or business of iron merchants," &c. The deed also contained mutual releases.

No paper whatever was set apart or delivered to the plaintiff, but some of it was sold by the defendant. The plaintiff had demanded the quantity he was entitled to under the deed, and the defendant refused to give him any. The defendant's counsel objected that the action would not lie, inasmuch as no certain definite quantity of paper belonged to the plaintiff; that either the whole property in it

1850.
 WILES
 v.
 WOODWARD.

passed to the defendant, or, if not, it was the joint property of both. It was contended on behalf of the plaintiff, that both parties were estopped by the deed from saying that no such delivery had taken place. The learned Judge left it to the jury to say, whether there was a conversion of the whole of the paper; and the jury having found in the affirmative, his Lordship directed a verdict for the plaintiff, reserving leave for the defendant to move to enter a nonsuit.

A rule nisi having been obtained accordingly—

Martin and T. Jones shewed cause, in last Hilary Vacation (Feb. 8). The recital in the deed, that paper to the value of 898*l.* 4*s.* 11*d.* has been delivered to the plaintiff, is an estoppel between the parties. The plaintiff could not have sued on the deed for a breach of covenant in not delivering the paper, for he is estopped by the recital from saying that no delivery has taken place. [*Parke, B.*—An estoppel is not binding in an action founded on a matter collateral to the deed: *Carpenter v. Buller (a)*.] This case falls within the principle of the decisions, that where a party, by his words or conduct, wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, the former is concluded from averring against the latter that a different state of things existed at the time: *Pickard v. Sears (b)*, *Freeman v. Cooke (c)*. Here both parties have agreed upon a given state of circumstances, and the plaintiff has a right, as against the defendant, to treat the paper as actually delivered. Where the defendant, a wharfinger, had accepted, without restriction, a delivery order for twenty sacks of flour, given to the plaintiff by a person from whom he had purchased them, that was held an admission that the defendant had twenty sacks which he would appropriate to that order: *Gillett v. Hill (d)*. This deed does not create a joint tenancy, or a tenancy in

(a) 8 M. & W. 209.

(b) 6 A. & E. 469.

(c) 2 Exch. 654.

(d) 2 C. & M. 530.

common in the paper, but it is an agreement between the parties, that a portion of the paper has become the property of the plaintiff; and the refusal to deliver any paper whatever was evidence of a conversion, although none in particular was set apart. [*Parke, B.*—In a contract of sale the parties must agree on the specific goods, otherwise no property passes. Thus, in *White v. Wilks*(a), where the agreement was for the sale of twenty tons of oil in the vendor's cisterns, and in point of fact the vendor had many cisterns with more than twenty tons in them: Sir *J. Mansfield* ruled that no property passed to the purchaser, because the contract did not attach on any particular portion of the oil; and that ruling was upheld by the Court of Common Pleas. Other authorities are collected in *Blackburn on Contract and Sale*, p. 123.] *Jackson v. Anderson*(b) is identical with the present case. There the plaintiffs' agent advised them that he had remitted to them 1969 dollars, consigned to L. L. received 4700 dollars, and pledged the bill of lading to the defendant, who received the price of the dollars at the Bank of England, where they were deposited for safe custody, on a sale of them to the Bank; and it was held, that although no specific dollars had been severed for the plaintiffs, yet, as the defendant had converted all the plaintiffs' and all his own, trover would lie for the plaintiffs' share. [They also argued that there was evidence of a conversion of the whole of the paper, and the Court intimated an opinion that there was ample evidence.]

1850.
 WILKS
 v.
 WOODWARD.

Watson and Pashley, in support of the rule.—It is clear that one joint tenant cannot maintain trover against another, unless there has been a destruction of the chattel: *Co. Lit.* 323. Now, at the time this deed was executed, the paper was the joint property of the plaintiff and defendant, and no severance has ever taken place. In order to

(a) 5 Taunt. 176.

(b) 4 Taunt. 24.

1850.
 WILES
 v.
 WOODWARD.

divest the joint property, it was necessary that there should be an appropriation of a specific portion to the plaintiff: *Wait v. Baker* (a), *Laidler v. Burlinson* (b). If half of the paper had been accidentally burnt, on whom would the loss fall? Or, suppose it were stolen, how would the property be laid in an indictment? There is no estoppel, for this is a claim collateral to the deed; and even if it were not, numerous authorities establish that estoppels by deed in order to be binding must be pleaded, if there has been an opportunity, otherwise the matter is at large: *Doe v. Huddart* (c), *Doe d. Strobe v. Seaton* (d), *Treviban v. Lawrence* (e), *Magrath v. Hardy* (f), *Doe v. Wright* (g), *Sanderson v. Collman* (h), *Vooght v. Winch* (i). [*Parke, B.*, referred to *Armstrong v. Norton* (k), *Doe v. Wellsman* (l).] The doctrine laid down in *Pickard v. Sears* (m), and which is explained in *Freeman v. Cooke* (n), has no application here; for this is not the case of a wilful misrepresentation by one person, whereby another is induced to alter his position, but it is a recital by deed of a fact false to the knowledge of both parties.—They also referred to the 2 & 3 Vict. c. 23.

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—The principal question involved in this case is one of some nicety. The plaintiff brought an action of trover for a quantity of paper; there were the pleas of “not guilty” and “not possessed.” It appeared on the trial, before my Brother *Patteson*, at York, that the plaintiff and

- | | |
|--|-----------------------|
| (a) 2 Exch 1. | (g) 10 A. & E. 763. |
| (b) 2 M. & W. 602. | (h) 4 M. & Gr. 209. |
| (c) 2 Cr. M. & R. 316. | (i) 2 B. & Ald. 662. |
| (d) 2 Cr. M. & R. 728. | (k) 2 Ir. L. Rep. 96. |
| (e) 2 Ld. Raym. 1048; <i>S. C.</i> , 1 | (l) 2 Exch. 368. |
| <i>Salk.</i> 276. | (m) 6 A. & E. 469. |
| (f) 4 Bing. N. C. 782. | (n) 2 Exch. 654. |

1850.
WILES
v.
WOODWARD.

defendant had been in partnership together, as paper makers and iron merchants, and that the partnership was dissolved by a deed on the 14th of February, 1844, by which it was recited, that an agreement had been made that the defendant should have all the stock in trade of the business of paper merchants, but that the plaintiff should receive paper out of that stock to the value of 898*l.* 4*s.* 11*d.*, which was to remain in the paper-mill for a year. On the other hand, the plaintiff was to have all the stock in trade in the iron business. The deed further recited, that, in pursuance of that arrangement, paper of that value had been actually delivered to the plaintiff, and that the same then was in the paper-mill, as the plaintiff acknowledged. The deed then contains an assignment by the defendant to the plaintiff of all the stock in trade in the iron business, and by the plaintiff to the defendant, of all the stock in trade in the paper-making business, except the 898*l.* 4*s.* 11*d.* worth of paper delivered to the plaintiff; and mutual releases, and a dissolution of the old partnership.

It also appeared, on the trial, that in fact no paper whatever was set apart or delivered to the plaintiff; and the counsel for the defendant, on the trial, contended, therefore, that the plaintiff could not maintain an action of trover, as no certain definite quantity of paper belonged to him; that, as all the paper was assigned to the defendant by the plaintiff except that delivered to the plaintiff, the whole was the defendant's; and if not, that it was still the joint property of both, and therefore no action of trover could be maintained by the plaintiff, being one joint tenant, against the defendant, who was another. To this it was answered for the plaintiff, that both parties were estopped by the deed to say that no such delivery had taken place to the plaintiff; and this not merely in an action on the deed, but in this proceeding, which it was said was to enforce the rights arising out of it, and not collateral to the deed. And we think that this was the position of the parties. A recital,

1850.
WILES
v.
WOODWARD.

when it is of a fact agreed upon by both, binds both, as was held in *Carpenter v. Buller* (a) and in *Young v. Raincock* (b), *Stronghill v. Buck* (c); and the present claim is not collateral to the deed, as was the case in *Carpenter v. Buller*. It is, therefore, an estoppel on both. The parties have agreed with respect to the stock in trade in the paper business, that they should stand precisely in the same situation as if the stock had been divided, and part to the stipulated amount delivered to the plaintiff; and being in that situation, the question is what their respective rights are.

If there had been a conversion of part only by the defendant, it would have been impossible, notwithstanding that agreement, to have said that the particular portion mentioned in the declaration was set apart for the plaintiff, and the plaintiff could not have recovered; he would have been in the same position as if, after the paper had been delivered, he had so confused it with the rest of the stock of paper as to make it impossible to ascertain it, and he could not have recovered for that conversion; but if the whole of the paper is converted the same difficulty does not arise, for there the part belonging to the plaintiff, whatever it is, must have been converted. Now, in the present case, we have before intimated our opinion that there was evidence of a conversion by the defendant of the whole stock of paper; the jury have found that conversion, and we think the plaintiff is therefore entitled to his verdict.

Rule discharged.

(a) 8 M. & W. 209.

(b) 7 C. B. 310.

(c) 14 Q. B.

1850.

SOUTHGATE v. SAUNDERS.

June 22.

IN this case a rule had been obtained, calling on the plaintiff to shew cause why the defendant should not be discharged out of the custody of the sheriff of Middlesex, on the ground that he was protected from arrest from the debt and costs for which he had been taken in execution, by a protection granted under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106.

It appeared on the affidavits, that, on the 12th of November, 1849, the defendant presented his petition in the Court of Bankruptcy for protection under the 211th section of that Act, and on the same day had a protection granted to him. A private meeting was appointed, pursuant to the 213th section, for the 20th of December, of which fourteen days' notice was given to the plaintiff, and on the 7th of December, the account of debts due from him, and of his estate and effects, with the proposal for compromise required by the 214th section, was filed; and on the 8th a copy was given to the official assignee.

In July, 1849, A. B. brought an action against C. D., and the cause was tried on the 28th of November following, when a verdict was found for the plaintiff, with 22*l.* damages; and on the 19th of December costs were taxed for 79*l.*, and judgment was signed. On the 12th of November the defendant had obtained a protection under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. A private meeting was ap-

pointed for the 20th of December, and notice was given to all the creditors, including the plaintiff. On the 7th of December, the defendant filed his account, proposing to pay his creditors 7*s.* 6*d.* in the pound, with a satisfactory guarantee for due payment. The plaintiff's debt was entered in the account so filed thus, "A. B." (the plaintiff) "disputed, has got judgment for 22*l.* and costs estimated at 50*l.*" On the 20th of December, the defendant swore to the truth of his account; and at a second meeting of his creditors, on the 31st of January, 1850, three-fifths of the creditors, but of whom the plaintiff was not one, assented to the compromise, subject to a guarantee to be given by S. S.; and this arrangement was subsequently confirmed by the Court, and S. S. gave a guarantee, in which the consideration was stated thus, "In consideration of your having consented, &c." The defendant was arrested on a ca. sa. after the protection had been granted, and whilst it remained in force.

On motion to discharge the defendant out of custody, on the ground that he was protected from arrest as to the debt and costs:—*Held*, that he was entitled to his discharge; *first*, that the debt was truly specified in the account; that although the sum of 22*l.* was incorrectly described as disputed, the verdict shewing it to be then due, inasmuch as the admission of the insolvent would not dispense with the proof of the debt under the statute, this description was immaterial; and that the amount was correct, as it was to be taken that the correctness of the account was sworn to at the time it was filed, which took place before the costs were ascertained.

Secondly, that the protection extended to the costs as well as the debt, which were merely accessory to the principal debt; and,

Thirdly, that assuming the guarantee so given to be void, as not disclosing any sufficient consideration, and, therefore, as incapable of being enforced, still that the protection was valid.

1850.
SOUTHGATE
v.
SAUNDERS.

The proposal was as follows :

" I propose to pay my respective creditors the sum of 7*s.* 6*d.* in the pound by way of composition upon the amount of their respective claims, in three equal instalments of 2*s.* 6*d.* each; the first instalment at four months, the second at eight months, and the third at twelve months from the date of the petition, with a satisfactory guarantee for the due payment of the same.

" GEORGE SAUNDERS."

On the 20th of December the defendant was examined on oath at the private meeting, and proved the truth of his account; three-fifths of the creditors assented to the proposed compromise by the following document :—

" The Bankrupt Law Consolidation Act, 1849.

" In the Court of Bankruptcy, London, the 31st of January, 1850. Before Mr. Commissioner Fane.

" In the matter of the petition of George Saunders, for arrangement under the superintendence and control of the Court.

" At a meeting held this day, we the undersigned creditors of the above-named petitioner, who have proved our respective debts under the above petition, do hereby consent and agree to the proposal agreed to at the last meeting, namely, to accept the sum of 7*s.* 6*d.* in the pound, by way of composition, upon the amount of our respective claims, in three equal instalments of 2*s.* 6*d.* each; the first instalment at four months, the second at eight months, and the third at twelve months from the date of the filing of the said petition, in full discharge of our respective debts, provided the amount of such composition be guaranteed by S. S., of &c."

This was confirmed on the 12th of February, 1850, and

1850.
SOUTHGATE
v.
SAUNDERS.

the protection extended to the 12th of April, 1850. On the 17th of May it was again extended to July. In pursuance of this compromise a guarantee was given by S. S., and a copy was sent to each creditor. The consideration was stated in the guarantee in the following terms:—"In consideration of *your having consented, &c.*" Whilst such protection was in force the defendant was arrested on a ca. sa. issued in this action for 22*l.* debt, and 79*l.* 14*s.* 3*d.* costs.

The debt for 22*l.* was due from the defendant to the plaintiff at the time of the defendant's petition, and issue had been then joined in this action. The cause was tried on the 28th of November, when a verdict was found for the plaintiff, and costs were taxed on the 19th of December, at 79*l.* 14*s.* 3*d.*, and judgment signed for the debt and costs.

The account filed by the defendant, on the 7th of December, of his debts and effects, stated those due to the plaintiff as follows:—"Southgate, William, disputed, has got judgment for 22*l.* and costs estimated at 50*l.*"

In last Trinity Term (June 4),

Humfrey shewed cause.—Several questions arise in the present case on the true construction of the Bankrupt Act, 12 & 13 Vict. c. 106. The sections of the Act which relate to arrangements made with creditors under the control of the Court, are contained in the 211th and 223rd sections, including the intermediate sections. There are three principal objections to this application. First, the debt is not truly specified in the account filed by the petitioner, for it is described as a *disputed* debt; but that is not a correct statement, as a verdict had been obtained against him. Moreover, the judgment was not for 22*l.* In the next place, the amount is described as being 50*l.*, whereas, in truth, the debt and costs amounted to nearly 80*l.*, and consequently there is a complete omission of 30*l.* He must have

1850.
SOUTHGATE
v.
SAUNDERS.

known that this was incorrect, as the taxation of the costs was made on the previous day. At all events, he would not be entitled to be discharged as to those debts which are not included in his account.

Secondly, he is not protected as to the costs, which did not become due until the taxation, which did not take place until after the protection was granted. This is not like a proceeding under the 1 & 2 Vict. c. 110, which provides for costs, but is an arrangement made by the petitioner with the creditors upon his own proposal. These costs were neither due nor even ascertained at the time of the petition and when the schedule was filed; and the petitioner could not, at that time, have entered into a compromise with the creditor with regard to the costs. Under the 221st section, the certificate operates "to all intents and purposes as fully as if the same were a certificate of conformity under a bankruptcy;" and the 200th section states the effect of the certificate under the bankruptcy to be to discharge the bankrupt "from all debts due by him when he became bankrupt, and from all claims and demands made proveable under the bankruptcy."

Thirdly, the certificate given by the Commissioner is invalid, and consequently the protection founded upon it falls with it. By the 216th section the creditors may, at the second meeting, prove their debts; "and if three-fifths in number and value of those who have proved debts to the amount of 10*l*. shall agree to accept such proposal as was assented to at the first sitting, the terms thereof shall be reduced into writing, and the creditors shall sign the same;" and the Court is then empowered "to approve and confirm the same." Now, the proposal of the petitioner, and the acceptance of the creditors, are not *ad idem*, for the original proposal is unconditional, whereas the acceptance is subject to a proviso, that the amount of the composition is to be guaranteed.

Lastly, the guarantee is void, for it purports to be in con-

sideration of *all* the creditors having consented to the arrangement, but as the plaintiff did not, it is void.

1850.
SOUTHGATE
v.
SAUNDERS.

Bramwell, in support of the rule.—First, it is objected that the description of the debt is inaccurate; but it is substantially correct. Where the debtor gives substantial information to the creditor, in the absence of all fraud, it is submitted that such account is sufficient. If the rule were otherwise, a debtor might lose the benefit of the Act by the merest inaccuracy. Here the costs were not ascertained at the time the account was sworn to, and therefore he could not make a distinct statement as to their amount.

Secondly, the defendant is protected against the costs, which are to be considered as a mere accessory to the principal debt, and cannot be distinguished from it. The defendant is taken in execution for the whole sum. *Lewis v. Piercy* (a) and *Brind v. Bacon* (b), are authorities to shew, that, in a case like the present, the debt and costs are inseparable. In *Harris v. James* (c), Lord Ellenborough, C.J., in delivering the judgment of the Court, says:—"It appears to us, on reference to the different provisions of the Act, to have been the object of it, that every bankrupt who had obtained his certificate of conformity, and which had been duly allowed, should be thereupon (that is upon pleading such plea and producing such certificate) discharged from all his debts, due or owing at the time that he did become bankrupt, for which he should have been impleaded after his bankruptcy; and that the discharge given him was meant to be a bar to all remedy by suit against him commenced after his bankruptcy for debts due antecedent to his bankruptcy." [*Parke*, B.—Under the old bankrupt law that was so; for there the certificate operated as a statutable release, as was held in *Van Sandau v. Corsbie* (d),

(a) 1 H. Bl. 29.

(b) 5 Taunt. 183.

(c) 9 East, 82.

(d) 3 B. & Ald. 13.

1850.
SOUTHGATE
v.
SAUNDERS.

which, by releasing the principal debt, released all the accessories. But this is a protection, and the question is, whether it stands upon the same footing—whether it is to operate upon the costs as well as the debt, and to protect the party beyond those debts which are correctly described in his account.] There is no good reason why the same rule should not apply to the costs, as the costs are mere accessories to the debt.

Thirdly, the terms of the proposal and acceptance, though not expressly identical, are sufficiently so. It may be observed that, by the 211th section, the Court may, independently of the agreement with the creditors, review the protection from time to time, and therefore the defendant is still entitled to his discharge. But independently of that ground, the objection is of no weight, for by the 215th section the creditors may “assent to the proposal of the petitioner, or to any modification thereof.” It may therefore be presumed that the proposal was accepted as modified. The objection to the guarantee also fails; for the acceptance of the proposal is that upon which the protection is to be considered as founded; but the guarantee is good, for the consideration of the guarantee may be legally described as proceeding from all the creditors, as by the terms of the Act the agreement of three-fifths is the agreement of all.

Cur. adv. vult.

The judgment of the Court was now delivered by—

PARKE, B.—In this case a rule nisi was obtained to discharge the defendant out of custody, on the ground that he was protected from arrest for the debt and costs for which he was taken in execution, by a protection granted under the statute 12 & 13 Vict. c. 106; and cause was shewn, and the case was fully argued before my Brothers *Alderson*, *Rolfe*, *Platt*, and myself. [After stating the facts of the case his Lordship proceeded:] The question on these facts

is, whether the defendant is entitled to be discharged as to the claim of 22*l*. and the costs, or either. We think he is entitled to his discharge from both.

This depends on the construction of the 12 & 13 Vict. c. 106, ss. 211 to 223. The 211th section enables the debtor to petition. The 214th section requires him "to file a full account of his debts, and the consideration thereof." The 215th section requires the creditors to prove their debts at the first sitting of the Court; and the petitioner is to attend and make oath of the truth of his account already filed, and may be examined thereon; and then three-fifths of the creditors to the amount of 10*l*. are to have the option of assenting to or dissenting from the proposed arrangement. By the 216th section, the arrangement, if approved, shall be reduced into writing and signed, and then becomes binding on all persons who were creditors at the date of the petition, who had notice of the sitting; and the Court may approve and confirm it, and enter it of record, and shall grant to the petitioner a certificate of the filing and entering of record, and shall indorse on such certificate a protection from arrest; and the petitioner shall be free from arrest at the suit of any person being a creditor at the time of the petition, and having had such several notices; with a proviso that no such protection shall be valid, *inter alia*, against any creditor whose debt is not truly specified in the account filed by the petitioner. By the 221st section, as soon as the agreement has been carried into effect, and the creditors satisfied according to its tenor, the Court shall give a certificate, which shall operate to all intents and purposes as fully as a certificate of conformity under a bankruptcy, with certain exceptions not material now to be noticed.

Upon the facts as above stated, several objections were taken to the defendant's right to be discharged.

First. That the debt was not truly specified in the account.

1850.
SOUTHGATE
v.
SAUNDERS.

Secondly. That the defendant was not protected against the claim for costs, because they had not arisen until the taxation, and after the account was filed.

Thirdly. That the certificate was given upon an imperfect agreement of the insolvent with his creditors, which could not be enforced, and therefore that the protection indorsed on the certificate was void.

As to the first objection, the debt of 22*l*. is no doubt correctly described as to amount; but it is represented to be disputed, whereas the verdict shews it to have been due. We think this makes no difference. The admission of the insolvent would not dispense with the proof of the debt under the 215th section, nor his disputing it render such proof necessary. It was also contended, that the debt was not truly specified, because, at the time the defendant swore to the truth of the account, the judgment had been signed and the costs taxed, and therefore the statement that the costs were uncertain was incorrect. But it is clear that the oath is taken to the correctness of the account as it stood when it was filed.

The second was the most important objection. No debt accrued with respect to the costs until they were taxed on the 19th of December, and that debt was not comprised in the account; and the question is, whether the protection extends to this debt, which did not accrue until after the protection. Certainly it could not, if this were a new and distinct debt arising after the petition. But it is an accessory only to the principal debt, and the claim for costs would certainly have been barred by a certificate under the 221st section, as it certainly would by a certificate in bankruptcy, although it could not be proved under the fiat. The certificate under that section would be granted when the resolution or agreement should be carried completely into effect; and in the mean time it is highly reasonable that the insolvent should have his person at liberty to enable him to manage his affairs, and to secure the completion of the arrange-

ment. We think that the protection granted under the 211th section has this effect. The power of the commissioner is to grant a protection of the person and property of the petitioner from all process; but that, of course, is limited to existing creditors at the time of the petition, as the form of the petition given in the schedule to the statute (A a) implies; and the form of the protection given in this case is from arrest "at the suit of any person *being a creditor* at the date of the petition." Of course it applies only to an action by him as such creditor for the then existing debt, but it precludes him from exercising his right to arrest in such an action, and it is only in such arrest, and in that action only that he could arrest for the costs—the remedy is entire for both. We are therefore of opinion that the insolvent is entitled to be discharged from arrest as to both debt and costs.

The last objection is, that the certificate, being founded on an incomplete arrangement for the guarantee sanctioned by the creditors, is void, as it expresses no sufficient consideration.

The form adopted is certainly unfortunate, and it is open to considerable doubt whether it would be valid. Possibly it may be supported by considering the meaning of the terms as addressed to all the creditors, and in consideration of the consent of three-fifths of them; but be this as it may, the protection of the commissioner is still valid, under the 211th section, whatever difficulties the form of guarantee may create as to enforcing it. The form should certainly be altered for the future. The rule must, therefore, be absolute to discharge the defendant.

Rule absolute.

1850.
SOUTHGATE
v.
SAUNDERS.

1850.

June 24.

MATTHEWS and Another v. LOWTHER.

In an action on a charter-party, the declaration stated, that by a charter-party made between the defendant, the shipowner, and the plaintiffs, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiffs' factors a full cargo, and thence proceed to Bristol, and that the vessel should have her orders before leaving Messina. The declaration, after containing averments that the ship arrived at Mes-

sina, and a general allegation of performance by the plaintiffs, laid as a breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiffs could have given orders for the ship to proceed to the said ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiffs, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charter-party, although the plaintiffs within such reasonable time as aforesaid provided merchandise, and were ready and willing to load on board the said ship the said merchandise; and although the plaintiffs would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports, and to have there loaded a full cargo:—*Held*, on general demurrer, that the declaration was bad, as it did not shew that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiffs of their part of the contract, and so did not shew that the defendant had incapacitated himself from performing his part of the contract; and that it ought to have contained an averment that the plaintiffs had performed their part by giving orders, &c., and by tendering a cargo within such reasonable time.

ASSUMPSIT on a charter-party. The declaration stated, that by a certain charter-party of affreightment, of the 5th January, 1849, made between the defendant, the owner of the ship "Yandew," then on her way to Messina, and the plaintiffs, it was mutually agreed that the ship should with all convenient speed sail and proceed to two ports in Sicily or usual place of loading, on and after the delivery of her outward cargo (which was to form no part of that agreement), and there load from the factors of the plaintiffs a full cargo of merchandise, and should then proceed to Bristol, &c.; and it was mutually agreed that the vessel should have her orders before leaving Messina, and also that cash should be advanced for ship's use free of commission, paying insurance only; and that thirty running days were to be allowed the plaintiffs, if the ship were not sooner dispatched, &c. The declaration, after containing an averment of mutual promises, proceeded to allege that the vessel did arrive at Messina with her outward cargo, and after containing the usual averment of a general performance by the plaintiffs of their part of the agreement, laid as a

1850.
MATTHEWS
v.
LOWTHER.

breach, that after the delivery of the outward cargo, and within a reasonable time after the delivery of the said outward cargo, and before such reasonable time after the arrival of the vessel and the delivery of the outward cargo had elapsed, and before the plaintiffs could or ought to have given orders for the ship to proceed to the said ports, and before the plaintiffs could, might, or ought to have delivered the said cargo, to wit, on &c., wrongfully, and contrary to the charter-party, made a certain other charter-party with other persons, to wit, &c., for the conveyance of goods from Messina to London; and with such last-mentioned goods, then and within such reasonable time as aforesaid, and before such reasonable time as aforesaid had elapsed, loaded his ship, and therewith afterwards, to wit, on &c., wrongfully, and contrary &c., proceeded to London, without receiving or taking on board the cargo agreed to be taken from the plaintiffs, and thereby &c., wholly incapacitated and deprived himself of the power of fulfilling the said charter-party; and so the plaintiffs say that the defendant, from the time of the said arrival of the said ship as aforesaid, neglected and refused to perform and keep the charter-party, although the plaintiffs, within such reasonable time as aforesaid, to wit, &c., provided large quantities of merchandise, to wit, &c.; and although the plaintiffs, within a reasonable time after the arrival of the ship and the delivery of the said outward cargo as aforesaid, and during all the time aforesaid, were ready and willing to load on board the said ship at the said port in Sicily, to wit, at &c., the said merchandise, of which the defendant had notice; and although the plaintiffs would otherwise, and but for the premises, have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports in Sicily after the delivery of the outward cargo, and there to have loaded a full cargo, &c.

The defendant pleaded several pleas to this declaration, and to these pleas the plaintiffs replied, and to the replica-

1850.
MATTHEWS
v.
LOWTHER.

tions the defendant demurred specially, and the plaintiff joined in demurrer; but as the question turned upon the sufficiency of the declaration, the subsequent pleadings are omitted.

Karslake, in support of the demurrer.—The declaration is bad in substance, as it does not contain any allegation that the plaintiffs tendered a cargo in pursuance of the terms of the contract, or that they gave any orders or directions, as they were bound to give; nor does the declaration contain any excuse for such omission. It does not appear at what time the vessel sailed from Messina; it may be, that it was after a reasonable time, within which it was the plaintiffs' duty to perform their part of the contract. The mere fact that at some time after the delivery of the outward cargo the defendant entered into another charter-party, cannot be taken as having incapacitated him from performing the contract.—The Court then called upon

Cowling to support the declaration.—The defendant incapacitated himself from performing the contract under which he was bound to the plaintiffs by loading the vessel with a third person's goods, and by leaving Messina with them. [*Platt*, B.—But then it does not appear that the vessel set sail within a reasonable time after the unloading of the outward cargo.] It appears that the charter-party upon which the action is brought was entered into whilst the vessel was on her passage to Sicily, and it follows that some time would be necessary for the purpose of transmitting orders to the plaintiffs' agents at the port of loading; and the declaration states, that before the plaintiffs "could or ought" to have given such orders, the defendant entered into the second contract, and loaded his vessel. [*Allderson*, B.—The defendant did not, by loading his vessel with a third party's goods, incapacitate himself from performing

the original charter-party, for he might have unloaded the vessel, and have been ready within a reasonable time to perform his engagement with the plaintiffs.] In *Ford v. Tiley (a)*, the defendant agreed with the plaintiff, that as soon as he became possessed of a house, he would execute a lease of it to the plaintiff from the 21st of December, 1825, for fourteen or twenty-one years. At the time the agreement was made the house was on lease, which did not expire till Midsummer, 1827. In June, 1825, the defendant executed a lease of the house in question to a third party for twenty-one years. The Court of King's Bench there held, that the defendant having put it out of his power, so long as the second lease lasted, to perform his contract with the plaintiff, was liable in an action for the breach of it. [*Alderson, B.*—In that case the defendant had actually transferred his interest in the estate by the execution of the lease; if he had merely agreed to execute the lease, the case would have been more like the present. There the two contracts would, no doubt, be inconsistent; but upon finding that his liability to the plaintiffs might be the more onerous of the two, he might shift his liability by not performing the second contract. Here the defendant has not, from aught that appears on the face of this declaration, incapacitated himself from performing his contract with the plaintiffs. He has not refused to perform the contract, nor has he done any act which has prevented him from completing it. It is very clear that there is no averment that the vessel set sail for London within a reasonable time for the plaintiffs to perform their part of the contract.]

PER CURIAM (b).—The plaintiffs may, if they please, amend within a month on the usual terms, otherwise there must be

Judgment for the defendant.

(a) 6 B. & C. 325.

(b) *Alderson, B., and Platt, B.*

1850.

June 24.

STANTON v. STYLES.

To a declaration in debt for goods sold, the defendant pleaded, first, that in an action brought by the now defendant in the county court of W. against the now plaintiff, the now plaintiff then set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15*l.*; that it was adjudged that the now defendant was not indebted to the now plaintiff in the said sum of 15*l.*, or any part thereof, and that the now plaintiff had no claim against the now defendant;—averring the identity of the two debts. Replication, that by the rules of the county

DEBT for goods sold and delivered.

The defendant pleaded, first, that the plaintiff ought not to be admitted to say that the defendant is indebted to him, or that the defendant contracted the said debt as in the declaration mentioned, because the defendant says, that before the commencement of this suit, and at the time of the entering of the plaint and of the issuing of the summons hereinafter mentioned, to wit, on &c., a county court, for the recovery of debts and demands, according to the provisions of the 9 & 10 Vict. c. 95, intitled &c., was established and holden in and for the county of Essex, and which Court was held at Waltham Abbey in the said county, and the plaintiff dwelt within the district within which the said Court was then and still is holden, and within the jurisdiction of that Court, and the defendant then dwelt within twenty miles from the plaintiff, and neither the plaintiff nor the defendant was an officer of that Court; and the plaintiff was then indebted to the defendant in a sum less than 20*l.*, to wit, 10*l.* 6*s.* 8*d.* for the price and value of goods sold and delivered by the defendant to the plaintiff at his request, within the jurisdiction of the said Court; and thereupon, for the recovery of the said debt so due to the defendant, to wit, on &c., the defendant brought a suit against the plaintiff in the said county court; and for court, made in pursuance of the statute, any defendant desirous of setting-off a debt was bound to give notice of set-off to the clerk of the Court, and that the now plaintiff did not give such notice:—*Held*, on demurrer, that the plea was bad.

The defendant pleaded, secondly, that in the county court of E., holden at W., before J. H. K., the Judge of the Court, and within the jurisdiction of the said Court, the now defendant recovered against the now plaintiff a certain debt of 10*l.* 6*s.* 8*d.* due to the now defendant from the now plaintiff, within the jurisdiction of and recoverable in the said Court, and 5*l.* 15*s.* 4*d.* for his costs, by which judgment it was ordered that the now plaintiff should immediately pay the debt and costs to the now defendant, as by the said record appeared.—Verification by the record, and offer to set off the above sums:—*Held*, on special demurrer to the plea, that it was bad in not properly shewing that the county court had jurisdiction over the subject matter.

that purpose the defendant then entered in a book kept for that purpose at the office of I. I., the clerk of the said Court, a plaint in writing, stating the names and last known place of abode of the plaintiff and the defendant, and the substance of the action intended to be brought by the defendant against the plaintiff in the said Court, according to the statute in such case &c.; and the defendant therein stated that the said action was brought for the recovery of the said 10*l.* 8*s.* 6*d.*; and the plaint was then numbered B 263, according to the order in which it was entered; and the said plaint being so entered, thereupon, to wit, on &c., a summons, stating the substance of the said action, and bearing in the margin thereof the same number as the said plaint was numbered, was within the jurisdiction of the said Court, to wit, issued out of that Court, under the seal thereof, at the suit of the defendant against the plaintiff, whereby the plaintiff was summoned to appear at the county court of Essex, to be held at Waltham Abbey aforesaid, in the said county, on the 19th of October, 1849, at the hour of twelve at noon, to answer the defendant in an action on contract for the recovery of the said sum of 10*l.* 6*s.* 8*d.*; and further, that the now plaintiff having appeared in the said action in that Court, at the said Court so held as aforesaid, according to and as required by the said summons, set up as a defence to the said action, that the now defendant was indebted to the now plaintiff in the sum of 15*l.* 0*s.* 6*d.* for goods sold and delivered by the now plaintiff to the now defendant, at his request, and gave notice to the defendant that he would, at the hearing of the said action, claim a set-off for the said alleged debt of 15*l.* 0*s.* 6*d.*, against the said debt so due to the defendant as aforesaid, and for which the said action was brought; and further, that such proceedings were thereupon had in that action, and upon the said plaint and defence in that Court, that afterwards, to wit, on the 19th day of October, 1849, the said action and defence and claim of set-off came

1850.
STANTON
v.
STYLES.

1860.
STAFFORD
v.
STYLER.

on to be and was tried in the said Court holden at Waltham Abbey, in the said county, within the jurisdiction of the said Court, before J. H. K., Esq., then Judge of the said Court, at which time and place the now plaintiff was duly, as required by law, called upon to appear, and did appear; and thereupon it was then adjudged by the said Court that the now defendant was not indebted to the now plaintiff in the sum of 15*l.* 0*s.* 6*d.*, or any part thereof, and that the now plaintiff had no claim against the defendant in respect thereof; and that the now defendant should recover against the now plaintiff the said sum of 10*l.* 6*s.* 8*d.* for his said debt, together with the costs of the said suit, amounting to 5*l.* 15*s.* 4*d.*; and it was then ordered by the said Court that the now plaintiff should immediately pay the same to the now defendant, as by the record and proceedings thereof still remaining in the said county court more fully appears, and which said judgment is in full force and effect, and not reversed, annulled, discharged, satisfied, or made void. The plea then averred, that the said supposed debt and cause of set off, so set up as a defence to the said action in the said county court, and the said debt and cause of action in the said first count mentioned, were and are one and the same debt and cause of action, &c.; and this the defendant is ready to verify by the said record. Wherefore the now defendant prays judgment if the now plaintiff ought to be admitted to say that the now defendant is indebted to him, or that the defendant contracted the said debt in the said declaration mentioned.

The defendant pleaded, secondly, as to 16*l.* 2*s.*, parcel &c., that before the commencement of this suit, to wit, in the county court of Essex, held at Waltham Abbey, in the said county, on the day and year last aforesaid, before J. H. K., Esq., the Judge of the said Court, according to the statute, &c., and within the jurisdiction of the said Court, the now defendant recovered against the now plaintiff, as well a certain debt of 10*l.* 6*s.* 8*d.*, due and owing to the now defendant from the now plaintiff, within

1850.
STANTON
v.
SEYLER.

the jurisdiction of and recoverable in the said Court, as also the sum of 5*l*. 15*s*. 4*d*. costs; by which said judgment it was ordered that the now plaintiff should immediately pay the said debt and costs to the now defendant as by the record, &c.; and which said judgment is in full force and effect, &c.; which the now defendant is ready to verify by the said record; and further, that the now plaintiff, before and at the time of the commencement of this suit, was and still is indebted to the now defendant in the said two sums of 10*l*. 6*s*. 8*d*., and 5*l*. 15*s*. 4*d*., making together the sum of 16*l*. 2*s*., upon and by virtue of the said judgment, which sum so due to the defendant equals the sum of 16*l*. 2*s*., parcel, &c., and all damages sustained by the plaintiff. The plea concluded by offering to set that sum off against the plaintiff's debt.

Replication to the first plea.—That the plaintiff ought to be admitted to say that the defendant was and is indebted to him as in the declaration mentioned, and that he contracted the debt as in that count mentioned, because he says that, after the passing of the said Act, and before the defendant commenced his suit against the plaintiff in the said county court (to wit) on &c., five of the Judges of the Superior Courts of Common Law at Westminster, to wit, (naming them), duly made and issued certain general rules for regulating the practice and proceedings of the county courts holden under the said Act, according to the said Act, and thereby directed that where a defendant desired to set-off any debt or demand alleged to be due to him by the plaintiff, he must give notice thereof in writing to the clerk of the Court, and deliver to such clerk two copies of a statement of the particulars of such set-off, five clear days before the return of the summons. The plea, after alleging that the rule was in full force at the time of the decision of the Court in the first plea mentioned, averred that the plaintiff did not give the notice to the clerk of the county court; and this the plaintiff is ready to verify; wherefore he prays judgment, and his debt in the said first count men-

1850.
STANTON
v.
STILES.

tioned, together with his damages by him sustained on occasion of the detention thereof to be adjudged to him, &c.

Special demurrer to the second plea, on the ground that it did not sufficiently appear thereby that the said Court mentioned therein had jurisdiction to give the judgment, or that the debt claimed in that action was not more than 20*l.*, or that the action was not within the exceptions of the statute, or that the cause of action arose within the district.

Special demurrer to the replication to the first plea, alleging for cause, that it did not contain the proper verification and prayer of judgment to the plea, being a plea in estoppel; and that the conclusion ought to have been with a prayer of judgment if the defendant ought to be admitted to his said plea, and that he might answer over &c.

Joinders in demurrer.

Lush for the plaintiff, in support of the replication to the first plea.—The replication is good, and shews that the plea is no answer to the plaintiff's claim. The plea in substance states, that in a plaint brought by the present defendant against the present plaintiff in the county court, the present plaintiff intended to set off the debt alleged to be due to him, and gave notice to the present defendant; but by the 76th section of the 9 & 10 Vict. c. 95, the then defendant should have given such notice to the clerk of the county court, and not to the then plaintiff. No sufficient notice, therefore, having been given in pursuance of the provisions of the Act, the adjudication of the county court is of no avail to the present defendant.

In the next place, the second plea is bad. The defence is founded upon the judgment of the county court on the set off, but no action could be maintained upon such a judgment. It therefore cannot be considered as a debt. The plea is also bad, as it does not shew that the county court had jurisdiction over the subject matter of the plea. It

does not even appear that the Court was established under and in pursuance of the 9 & 10 Vict. c. 95. The rule is, that in all proceedings in inferior courts it is necessary to shew that the matter adjudicated upon was within the jurisdiction of the particular Court.

1850.
STANTON
v.
STILES.

Bovill contra.—The first plea is good, and the replication to it is bad. The judgment of a county court, being a court of record, is conclusive. The mere fact that the notice is not sufficient does not invalidate the whole proceeding. It was held in *Eastmure v. Laws(a)*, that when a verdict is found against a defendant on a plea of set off, he is estopped from suing the plaintiff for the demand specified in the plea of set off. [*Alderson, B.*—In the county court there is no plea of set off, but the notice only. There has been no notice here, and therefore the matter has never been properly in issue, and a jury would not be warranted in finding a verdict upon the matter.]

Secondly, the last plea is good. The defendant relies upon the judgment of a Court of record, which is *primâ facie* good, and it lies upon the plaintiff to impeach it. The plea is by way of estoppel, and it is therefore not necessary to set out the jurisdiction of the Court.

ALDERSON, B.—The plaintiff is entitled to judgment on the demurrer to the replication to the first plea, and on the demurrer to the second plea; but the defendant may have liberty to amend the second plea, as he ought to have an opportunity of pleading the set-off. The objections to that plea, which are made the subject of special demurrer, are good, as it is necessary for a party who relies upon the decision of an inferior tribunal to shew that the proceedings were within the jurisdiction of the Court. The defendant may, therefore, amend within a week; otherwise there will be

Judgment for the plaintiff.

(a) 5 Bing. N. C. 444.

1850.

July 8.

FRIAR v. GREY and Others.

The plaintiff demised to the defendant a coal mine for forty-two years, at a certain yearly rent. The lease contained numerous covenants on the part of the lessee for payment of rent, and in respect of the working of the mine, &c., with a proviso for re-entry on breach of any of them; and also a proviso, that if the lessees should be desirous to quit the premises at the end of the first eight years of the term, and of such their desire should give the lessor notice in writing eighteen calendar months before the expiration of such eighth year, then, *all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been observed and performed*, the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants:—*Held*, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that the performance of *all* the covenants by the lessee was a condition precedent to his right to determine the lease.

COVENANT on an indenture of lease, by the devisee of the reversion against the lessees. Breach, non-payment of rent.

The plea commenced by setting out on oyer the indenture, whereby John Friar, the plaintiff's testator, demised to the defendants a certain "colliery, coal mine, and seam and seams of coal, as well opened as not opened," with liberty to dig pits, shafts, &c.; "and also a certain tenement or farmhold, with the fields, closes, and parcels of ground enjoyed therewith," for a term of forty-two years, "yielding and paying unto J. Friar, his heirs and assigns, for and in respect of the colliery, coal mines, seam and seams of coal, liberties and privileges, yearly and every year, during the continuance of the said term, the rent or sum of 280*l*., for the yearly number of 134,588 bolls (each boll to contain twenty-four imperial gallons), of coal, to be wrought and gotten forth and out of the said colliery and coal mines, and there vended or removed from and out of the hereditaments hereby demised, the said yearly rent of 280*l*., to be paid whether such number or quantity of coal be yearly wrought and gotten forth or out of the said colliery and coal mines, and there vended or thence removed as aforesaid, or not; and also yielding and paying unto J. Friar, his heirs, &c., in respect thereof, over and above the yearly rent of 280*l*., a further rent or sum of money for each and every boll of coal which shall be had and obtained out of the said pits and mines, and there vended or

the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants:—*Held*, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that the performance of *all* the covenants by the lessee was a condition precedent to his right to determine the lease.

1860.

FRIAR
v.
GUTH.

thence removed, over and above the annual quantity above specified, at and after the rate and in the proportion of 200*l*. for 130,208 bolls; and also yielding and paying for or in respect of the said tenement or farmhold and lands, and other the premises hereby demised, yearly and every year, during the continuance of the said term of forty-two years, unto J. Friar, his heirs, &c., the rent or sum of 51*l*.; the several and respective rents hereinbefore reserved and made payable, to be paid at two days or times in the year (that is to say), the 11th of November and the 12th of May, in each year," &c.; "and it is hereby declared and mutually agreed by and amongst the parties hereto, that if the quantity of coals wrought in the said colliery and coal mines by the said lessees, their executors, &c., shall, in any year, fall short of or be less than the quantity specified to be wrought in each year for or in respect of the said rent of 280*l*., then it shall be lawful for the lessees, their executors, &c., to make up the deficiency within three years next after such deficiency shall happen, but not after the end or other sooner determination of the term hereby granted, on any account whatever." Then followed affirmative and negative covenants on the part of the lessees, in respect of the several matters mentioned in the following proviso:—"Provided always, and it is hereby declared and agreed between the parties hereto, that if the said several rents or sums of money hereby reserved or made payable, or any of them or any part thereof respectively, shall be in arrear and unpaid for the space of forty days next after the said days or times of payment; or if the lessees, their executors, &c., shall refuse or neglect to make and pay unto J. Friar, his heirs, &c., or their tenants or farmers, for the time being, all and every or any sum or sums of money which shall be adjudged or awarded to be paid to him or them for damage, for the exercise of any of the powers and liberties hereby granted; or shall neglect or refuse to obey or perform any award which shall be made of or concerning

1850.

FRIAR
v.
GENT.

any other cause, matter, or thing, under or pursuant to the clause or provision for arbitration hereinafter contained; or if the said lessees, their executors, &c., shall neglect to fill up such pits as shall not be needed for air, or water-courses, or drawing coal; or shall neglect to carry on and manage the said colliery and lands in the manner hereinbefore specified; or shall not leave good and sufficient walls and pillars of coal, as well to support the roof and remaining part of the seam as to prevent any creep or thrust coming in upon the said colliery; or shall do or suffer to be done any neglect or wilful matter or thing, whereby the same may be drowned or overburthened with water or sythe, or whereby any creep or thrust may be brought thereon, or the same may be otherwise damnified; or shall not leave a barrier of twenty yards against the adjoining collieries, unless authorised as aforesaid to do otherwise; or shall work or win any coal or otherwise disturb the strata underneath the site of any of the said dwelling houses, offices, or other buildings, or underneath any part of the said land, situate within twenty yards from any such site; or shall at any time neglect or refuse, after having been thereunto required, to give and present to the said J. Friar, his heirs, or assigns, or his or their agent or agents, such monthly account of the quantities of coal wrought and won as aforesaid; or shall hinder or obstruct the said J. Friar, his heirs, &c., from perusing, inspecting, or examining the overseer's book of presentments, or from measuring or gauging the corves, tubs, or baskets, as aforesaid, or from entering, viewing, and inspecting the said colliery; or shall not keep and maintain in such repair as aforesaid, all and every the houses, buildings, erections, water-levels, drains, water-courses, and other matters and things belonging to the said premises; or shall at any time or times demise, assign, or otherwise dispose of or part with the possession of the said colliery, coal mines, lands, and premises, or any part thereof, or do, commit, or suffer any act whereby the

same, or any part thereof, may be assigned or otherwise disposed of, or the possession thereof parted with to any other person or persons whomsoever (save only as regards such partnership as hereinbefore is excepted), without such express licence and consent for that purpose as hereinbefore is required; or shall enter into partnership with any other person or persons in the said colliery or coal mines (save as aforesaid); or shall neglect or omit to manage and cultivate the said lands hereby demised in the manner hereinbefore appointed and laid down; or shall obstruct and prevent the said J. Friar, his heirs, &c., from making trials towards or for the purpose of a future provision for working of coal in manner hereinbefore expressed; or if the said lessees, or the survivors or survivor of them, or the persons or person whomsoever in whom this present lease shall be beneficially vested for the time being, shall become and be adjudged bankrupts or bankrupt within the laws concerning bankruptcy: then, and in any or either of the said cases, the covenant for quiet enjoyment hereinafter contained shall cease and be void, and it shall and will be lawful for the said J. Friar, his heirs or assigns, at any time thereafter to enter into and upon the said colliery, lands, mines, and other premises hereby demised, or any part thereof in the name of the whole, and the same to have again, re-possess, and re-enjoy as of his or their former estate, right, and interest, anything herein contained to the contrary thereof notwithstanding; and then also, and in any or either of the said cases, it shall be lawful for the said J. Friar, his heirs, &c., to enter into and upon all or any part of the said premises, and there seize, have, and take possession of all or any of the engines, bands, ropes, tackle, utensils, railways, goods, chattels, and effects used and employed in carrying on the said colliery, and to put out and remove the said lessees, their executors, &c., from the possession thereof, and to sell and dispose of the said goods, chattels, effects, and premises, in and towards the payment

1850.

FRIAR
v.
GRAY.

1860.

FRIAR
v.
GRIFF.

of all or any of the said respective rents which may be in arrear. Provided also, that if the said lessees, their executors or administrators shall be desirous to quit the said premises hereby demised at the end of the first eight years of the said term, or at the end of the first or any subsequent three years after the expiration of the said eight years, and of such their desire shall give to the said J. Friar, his heirs or assigns, notice in writing eighteen calendar months before the expiration of such eighth year, and thereafter before the expiration of any such three years (as the case may be), then and in such case (all arrears of rent being paid), and all and singular the covenants and agreements on the part of the said lessees having been duly observed and performed, this lease, and every clause and thing herein contained, shall, at the expiration of the first eighth year, and thereafter at the expiration of any such third year, (whichever in the said notice shall be expressed,) cease, determine, and be utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired: but nevertheless without prejudice to any claim or remedy which any of the parties hereto or their respective representatives may then be entitled to for breach of any of the covenants or agreements hereinbefore contained." Then followed a covenant for quiet enjoyment, the lessees paying the rents and performing the covenants. "And further that it shall and may be lawful to and for the lessees, their executors, &c., at any time or times within the space of six calendar months next after the expiration or other sooner determination of the term hereby granted or demised, to lead, take, and carry away all and every such quantities of coal as shall have been brought and gotten out of the said colliery and coal mines, and laid above ground, and be then remaining at any of the pits: Provided that the said lessees, their executors, &c., shall and do in the first place well and truly pay and satisfy all such rents as shall be then in arrear and

1850.

FRIAR

v.

GREY.

unpaid. And further, that it shall and may be lawful to and for the lessees, their executors, &c., (paying the rents and performing the covenants as aforesaid,) in the harvest time next after the end and expiration of the said term, peaceably and quietly to have, cut down, reap, and carry away the way-going crop of corn or grain by them sown upon thirty-four acres and no more of the lands, which, according to the covenants hereinbefore contained and the true intent and meaning of these presents, shall then be in ploughing or tillage, and that they shall have the use of the stack, garth, barn, and granary, and also of one cottage belonging to the said premises, until the 12th day of May next after the determination of this demise." There was also a covenant for reference to arbitration of disputes concerning any covenant, clause, word, matter, or thing therein contained.

The plea then stated, that the whole of the rent in the declaration alleged to have become due and payable, was due and payable, and the supposed breaches of covenant in the declaration mentioned respectively arose and happened after the 12th of May, 1846, and after the expiration of the first eight years of the said term, and after the said lease and every clause and thing therein contained had ceased, determined, and become void, as hereinafter mentioned. And the defendants further say, that after the making of the said indenture, and after the death of the said J. Friar, and after the plaintiff became so seised as aforesaid, and eighteen calendar months before the expiration of the first eight years of the said term, to wit, on &c., the defendants, being desirous to quit the said demised premises at the end of the first eight years of the said term, gave to the plaintiff notice in writing of such their desire, and thereby gave the plaintiff notice that they would quit and deliver up possession of the said demised premises on the 12th of May, 1846, being the end of the first eight years of the said term. That at the expiration of those eight years, all arrears of the

1850.

FRIAR

v.

GREY.

said rents so reserved and made payable by the said indenture having been paid, and all and singular the covenants and agreements in the said indenture contained on the part of the defendants having been duly observed and performed at the expiration of the said first eighth year of the said term (and which happened before the commencement of this suit), the said lease and every clause and thing therein contained ceased, determined, and were utterly void, to all intents and purposes, in like manner as if the whole of the said term of forty-two years had then run out and expired, according to the said indenture and the said proviso in that behalf so therein contained as aforesaid.—Verification.

Replication.—That all and singular the covenants and agreements in the said indenture contained on the part of the defendants had not been and were not duly observed and performed at the expiration of the said first eighth year, modo et forma; but on the contrary thereof the plaintiff saith, that after the making of the said indenture, and during the term thereby granted, and before the expiration of the first eight years of the term, and after the plaintiff became so seised as aforesaid, to wit, on &c., and on divers other days and times afterwards and before the expiration of the first eight years of the said term, the defendants wilfully and negligently omitted to draw and pump out of the said colliery and coal mines divers large quantities of water, which during and on each of those days and times was standing, remaining, and being therein, and which they then might and ought to have drawn and pumped thereout; and by reason and in consequence of such neglect and omission, the said collieries and coal mines then became and were drowned and overburthened with water from waters in the said colliery, contrary to the said indenture and the covenant of the defendants in that behalf; and that, at the expiration of the first eight years of the said term, the last-mentioned breach of covenant was still subsisting and continuing.—Verification.

Demurrer (a), and joinder therein.

1850.

FRIAR
v.
GREY.

Hugh Hill argued in support of the demurrer (June 5 and 8.)—The question is, whether the performance of the covenants on the part of the lessees constitutes a condition precedent to their right to determine the lease; and it is submitted that it does not. In the case of *Friar v. Grey* (b), the same point was discussed in the Court of Queen's Bench, who held that the performance of the covenants was a condition precedent; but that judgment was reversed by the Court of Exchequer Chamber, *Grey v. Friar* (c); and, although their decision proceeded on the ground that the replication was bad, yet on this point also they expressed a strong opinion at variance with that of the Court of Queen's Bench. The question is one of construction, and the intention of the parties must be collected from the contract itself. The proviso immediately preceding explains this. It could hardly be argued that any breach of covenant, however trifling, would entitle the lessor to re-enter; but according to the plaintiff's construction, the slightest breach would prevent the lessees from determining the lease. Such a construction would be productive of the greatest inconvenience in leases like the present, which, of necessity, contain very numerous and minute covenants. [*Alderson*, B.—The words "all arrears of rent being paid" contemplate some breach of covenant.] The case of *Porter v. Shephard* (d), which is relied upon by the plaintiff, is distinguishable from the present case; there the lease contained a proviso, that the lessee might determine the term at the end of the first three or five years, giving six months previous notice, and that then, "from and after the expiration of the first three or five years, and payment of all rents and arrears of

(a) The defendants demurred specially, but the argument and judgment proceeded on the general ground.

(b) 17 L. J., Q. B., 301.

(c) 19 L. J., Q. B., 393.

(d) 6 T. R. 665.

1850.

PRIAR
v.
GENT.

rent and duties on the tenant's part to be paid, and performance of the covenants contained on the part of the lessee, the indenture and every clause therein should cease and be utterly void." The ground of that decision was, that the words "from and after" created a condition precedent; and that, if it were not so, the landlord would be left without remedy for existing breaches of covenant, inasmuch as the stipulation was that, after the expiration of the notice, the lease should be void. Here the words used are, "all arrears of rent being paid," &c.; and there is an express reservation of any claim or remedy which either party may be entitled to for breach of any covenant. The words "from and after" indicate an intention to create a condition precedent: Roll. Abridg. "Condition" (T.), pl. 11; Com. Dig. "Condition" (B. 1); Shep. Touch. 122; but the words "paying rent" do not make a covenant conditional: *Hays v. Bickerstaffe* (a), *Warren v. Asters* (b), *Allen v. Babington* (c), *Dawson v. Dyer* (d). That distinction seems to have been understood by the parties; for whenever they meant to create a condition precedent apt words are used. No effect can be given to the latter part of the proviso, unless it was intended to preserve the remedy for breaches of covenant existing at the end of the term. It will be argued, that its object was to preserve the lessor's right of suing for breaches which he would otherwise waive by accepting the notice; but a contract under seal cannot be waived by matter in pais: *Thompson v. Brown* (e), *Little v. Holland* (f), *Leslie v. De La Torre* (g). Therefore, if this be construed as a condition precedent, the lessor could not sue in respect of breaches of covenant existing at the time the lease was put an end to; for it would be necessary to allege in the declaration either that the condition had been

(a) 2 Mod. 34.

(b) Sir T. Jones, 205.

(c) Sid. 280.

(d) 5 B. & Ad. 584.

(e) 7 Taunt. 656.

(f) 3 T. R. 590.

(g) Cited in *White v. Parkin*,
12 East, 583.

1860.
 PERMANENT
 v.
 GENT.

performed or waived. The stipulations, that, after the determination of the term, the lessees shall be at liberty to carry away coal wrought, and to reap the way-going crop, and that they shall have the use of the farm, &c., (paying the rents and performing the covenants,) shew that the parties contemplated some covenants of which there would be breaches when the lease was determined. The reservation of the rent is similar to that in the case of *The Marquis of Bute v. Thompson* (a), and the proviso was no doubt inserted for the purpose of enabling the lessees to determine the lease if the coal was exhausted.

Manisty, contra.—The doctrine applicable to covenants has no relation to this proviso, which is a power dependent on a condition for the lessees to determine a term absolute in the first instance for forty-two years. The language of the proviso is consistent with the intention of the parties; but in order to give effect to the defendants' construction, the Court must strike out the words "all arrears of rent being paid," &c. The proviso next preceding the one in question empowers the lessor to re-enter upon breach of any of the covenants, and on the other hand the performance of each and every covenant is a condition precedent to the lessees' right to determine the lease. The cases relied on by the defendants proceed on the principle, that the covenants go only to a *part* of the consideration, and that is different from a power dependent on a condition. In the latter case, there is no instance in which the words "*having been performed*" have not constituted a condition precedent. A proviso or power in discharge of a liability is always construed strictly: *Marshall v. Powell* (b). The true doctrine as to the effect of the words "provided always," is found in *Simpson v. Titterell* (c), where *Periam, J.*, said, "*Proviso always* implieth a condition, if there be not words subsequent which

(a) 13 M. & W. 487. (b) 9 Q. B. 779. (c) Cro. Eliz. 242.

1850.

PRIAR

v.

GREY.

may peradventure change it into a covenant, as where there is another penalty annexed to it for non-performance, as *Dockwray's Case*, 27 Hen. VIII. pl. 14. But it is a rule in provisoes, that where the proviso is, that the lessee shall perform or not perform a thing, and no penalty to it, this is a condition, otherwise it is void; but if a penalty is annexed aliter est, to which the rest of the justices agreed." Covenants which go to the *whole* of the consideration have always been held to be conditions precedent: *Ritchie v. Atkinson*(a), *The Duke of St. Albans v. Shore*(b), *Stavers v. Curling*(c). In *Porter v. Shephard*(d) the covenants were as minute as in the present case; and there is no real difference between the words "from and after," there used, and "but nevertheless" as in this proviso. The Court will so read those words as to give effect to the proviso: *Walker v. Giles*(e). Perhaps that latter clause was introduced pro majore cautela; or possibly its object was to preserve the lessor's right to sue for breaches of covenant not known to him at the time he took possession. It is true, that a person who seeks to enforce a covenant subject to the performance on his part of a condition precedent, cannot aver that such condition was discharged by parol; but there is no authority for saying that a person in whose favour there is a condition precedent may not waive it. Here the lessor might accept the notice and determine the lease by taking possession, although the covenants were not performed. If, when the notice expired, the lessees satisfied all the lessor's claims in respect of the covenants, that would be a performance within the terms of the proviso. Should any question then arise, there is a stipulation by which the lessees could require it to be determined by arbitration.

(a) 10 East, 295.

(b) 1 H. Black. 270.

(c) 3 Bing. N. C. 355.

(d) 6 T. R. 665.

(e) 6 C. B. 662.

Hugh Hill, in reply, referred to *Dawson v. Dyer* (a).

Cur. adv. vult.

1850.

FRIAR
v.
GREY.

The judgment of the Court was now delivered by

ROLFE, B.—The question in this case arose on a demurrer to the replication. [His Lordship stated the pleadings.] The only question is, whether the payment of rent and performance of all the covenants are, according to the true construction of this lease, a condition precedent to the tenant's right of determining it at the end of the first eight years. Now, but for the words at the end of the proviso in question, "nevertheless without prejudice, &c.," we should not have hesitated to treat the performance of all covenants as a condition precedent to the tenants' right of putting an end to the term. Indeed, the case would then have been undistinguishable from *Porter v. Shephard*. But the words to which we have just referred, and which did not occur in *Porter v. Shephard*, appear to us materially to vary the case. To hold that the literal performance of every covenant is a condition precedent to the right given to the tenant to put an end to his term, will practically be, in almost every case of mining leases, to render the exercise of that right impossible. It can rarely happen that in a lease of this description some covenant should not, at some time or other, have been broken. Still, if the language of the lease is unambiguous, and the strict and literal performance of every covenant is made a condition precedent to the right given to the tenant, we are not at liberty to give to the instrument a sense different from what its language imports, and to say that the parties could not have meant what they have said. But the extreme inconvenience of a particular construction may well justify us in looking at all the accompanying language, in order to discover, if it be possible, expressions which may warrant an inference that the words leading to the inconvenience were

(a) 5 B. & Ad. 584.

1850.

FRIAR
v.
GIBBY.

not intended by the parties in their natural and obvious sense; and in this case we think that the words to which we have already alluded do enable us to say, that the performance of all the covenants could not have been intended by the parties to be a condition precedent to the right of determining the lease, for if that had been the meaning, the reservation of a right to sue on any broken covenants would have been absurd.

We do not go further into the question, for the very point has already been twice discussed on this very case, once in the Court of Queen's Bench, and once on writ of error to the Exchequer Chamber, not indeed on the present record, but in an action for previous arrears of rent. In that case the Court of Queen's Bench held the condition to be a condition precedent, and gave judgment for the plaintiff. That judgment was reversed in the Exchequer Chamber, on the ground of a defect in the mode of pleading, which defect does not exist in the case before us. The reversal, therefore, does not govern the present case. But the Court of Error, though it proceeded on the defective mode of pleading, yet expressed also a strong opinion that there was no condition precedent, relying on the qualifying words to which we have alluded. The case, therefore, is not strictly governed by authority as to either mode of construction. We have, on the one hand, a decision of the Court of Queen's Bench; but that decision, having been reversed, though on another point, can be treated as no more than an extrajudicial expression of opinion, entitled certainly to great weight, but not as decisive. On the other hand, there is the unanimous judgment of the Exchequer Chamber, expressing a strong opinion, but also, under the circumstances, extrajudicial, the other way. With this latter opinion we coincide, and must, therefore, give our judgment for the defendants, leaving it to the plaintiff to carry the case, if he shall be advised so to do, to the Court of Error.

Judgment for the defendants.

1850.

PRIAR
v.
GRANT.

A WRIT of error having been brought upon the above judgment in the Exchequer Chamber, it was argued in the Vacation Sittings after Easter Term, 1851 (May 16) (a), by *Manisty* for the plaintiff in error, and by *Hugh Hill* for the defendants in error. The plaintiff's point for argument was, "that observance and performance of the covenants and agreements of the lessees were a condition precedent to their power to determine the lease." The arguments were in substance the same as in the Court below. The following additional cases were cited:—*Bootle v. Blundell* (b), *Grover v. Burningham* (c), *Bengough v. Edridge* (d), *Kemble v. Farren* (e), *Horner v. Flintoff* (f), *Heard v. Wadham* (g), and *West v. Blakeway* (h).

The Court said that they would call upon *Manisty* to reply, if they should think it necessary to hear any further argument for the plaintiff in error; but he was not called upon.

Cur. adv. vult.

The judgment of the Court was delivered (May 19, 1851) by

PATTESON, J.—This case turns upon the construction which ought to be put upon the proviso for determining the lease; and that construction must undoubtedly be put which the Court, by examination of the lease, finds to be according to the meaning of the parties to the contract.

The proviso is inserted solely for the benefit of the lessees, apparently to enable them to determine the lease and get rid of the fixed rent at the end of the first eight years, if

(a) Before *Patteson, J., Maule, J., Wightman, J., Erle, J., and Williams, J.*

(b) 19 Ves. 521.

(c) 5 Exch. 184.

(d) 1 Sim. 173.

(e) 6 Bing. 141.

(f) 9 M. & W. 678.

(g) 1 East, 619.

(h) 2 M. & Gr. 729.

1850.

FRIAR

v.

GREY.

they shall be desirous to do so; probably contemplating that the lessees might in that time either have exhausted the mines, or have found that it was not worth their while to continue to work them. The proviso does not give the lessor any power of determining the lease, nor does any other clause in the lease give him such power.

The proviso runs in these terms: "Then and in such case, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees *having been* duly observed and performed, this lease and every clause and thing therein contained shall cease, determine, and be utterly void to all intents and purposes, in like manner as if the whole of the said term of forty years had then run out and expired. But nevertheless without prejudice to any claim or remedy which *any of the parties hereto*, or their respective representatives, may then be entitled to for breach of any of the covenants and agreements hereinbefore contained."

It seems to be clear that this proviso, but for the last clause of it, would make the due performance of all the covenants on the part of the lessees a condition precedent to their right to determine the lease. The words are (as regards the covenants) "*having been* duly observed and performed," and they are inserted in the middle of the proviso. Unless they were intended to qualify and limit the power, one cannot see what possible sense they can have. They can hardly have been intended to preserve the right of the lessor to recover for breaches of covenant, for that right is preserved by the last clause in much more ample and significant terms. Not that it was necessary to insert any words expressly reserving such right, for the right would exist in point of law without any such clause, though a contrary rule was formerly attempted to be established, which circumstance may in some way account for the insertion of the latter clause of this proviso, *ex majore cautela*. The case of *Porter v. Shephard*, decided first by the Court

of Common Pleas, and afterwards by the Court of King's Bench on error, is directly in point, though the learned counsel for the defendants in error attempted to distinguish it by reason of the words "from and after" which are found in that case; but those words really make no difference in the sense of the proviso.

1850.
FRIAR
v.
GIBBY.

The multiplicity and minuteness of the covenants on the part of the lessees was urged to shew the improbability of the parties meaning that any the slightest breach of them should deprive the lessees of the benefit of this proviso, and the inconvenience of such a construction in regard to similar leases was also urged. But these reasons do not justify the Court in refusing to put such construction on the words as they plainly require, and in effect rejecting them altogether, which we must do if we hold them not to be a condition precedent. Again, it is by no means clear that every minute breach of the covenants would deprive the lessees of the benefit of the proviso, for there are clauses respecting reference to arbitration which, if complied with, might well be held to be a due observance and performance of the covenants within the meaning of this proviso. But it is said that the latter clause is inconsistent with the construction of the former as a condition precedent, for that it manifestly contemplates that the lease might be determined, notwithstanding existing breaches of covenant on the part of the lessees, whereas, if it could only be determined in case all the covenants were duly observed and performed, no such breaches could exist, and yet the lease be determined.

There are many answers to this argument.

First. It might happen that the lessor was ignorant of the existence of breaches of covenant till after he had acted on the notice to determine the lease, and taken possession of the mines at the expiration of it; and the clause may have been inserted for greater caution, to enable him to recover for such breaches so subsequently discovered; and the

1850.

PRIAR

v.

GENT.

clause may apply to other remedies than by action, such as re-entry and distress.

Secondly. The clause might apply where the lessor had waived the condition precedent by accepting the notice and taking possession, although he might be aware of some breaches of covenant. For we do not think the argument sound, that although a deed would be necessary to do away with the condition precedent, as such, before breach, therefore that after breach the lessor might not waive the condition without deed.

Thirdly. The clause applies to *both* parties, lessees as well as lessor, so that it preserves the right of the lessees to sue the lessor for breaches of covenant, if any, though they have themselves, by their own act, determined the lease.

All these views of the latter clause enable the Court to give effect to the words of that clause consistently with the construction of the former as a condition precedent, and so all the words are made to have some effect; whereas, by a different construction, as we have already observed, the words in the former part of the proviso would in effect be struck out.

For these reasons, we are of opinion that the proviso must be construed as containing a condition precedent, and that the judgment of the Court below must be reversed.

Judgment reversed.

1850.

MALCOLM v. SCOTT and Others.

June 17.

THIS was an action brought in pursuance of an order of Lord Chancellor *Cottenham* (a). The declaration was in assumpsit for money had and received by the defendants for the plaintiff's use. The defendants pleaded non assumpsit.

At the trial, before *Rolfe*, B., at the Liverpool Spring Assizes, 1849, it appeared that the action was brought to recover the sum of 10,625*l.* (equivalent to a lac of rupees), under the following circumstances:—The plaintiff was a merchant, carrying on business at Liverpool, under the name of George Malcolm & Co. The defendants, Scott, Bell, & Co., were merchants in London, and the correspondents of Adam, Scott, & Co., merchants at Calcutta, who, at the time of the transaction in question, were considerably indebted to the plaintiff. The claim of the plaintiff in this action was founded on a correspondence, the material part of which is comprised in the following letters.

On the 16th January, 1841, the Calcutta firm wrote to the defendants as follows:—

“Calcutta, 16th January, 1841.

“Dear Sirs—Ere this reaches we hope you will have realised a large portion of our consignments and remittan-

“to advise” him of the request of the Calcutta firm, adding—“at the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you.” On the 14th March, 1841, the defendants wrote to the Calcutta firm in answer to their letter, that the state of their account would not warrant the defendants in meeting the requisition for the present; but should they be in a position to meet it before November they would do so. By letter of the 18th January, 1842, the Calcutta firm revoked their order for the appropriation of the money:—*Held*, that the correspondence did not create an absolute contract on the part of the defendants to pay to the plaintiff the amount in question out of the remittances and consignments; and that, consequently, he could not sue them for money had and received for his use.

A mercantile firm at Calcutta, by letter dated the 16th January, 1841, requested the defendants, their correspondents in London, to hold a sum of money, payable on the 19th November following out of remittances and consignments on their general account, at the disposal of the plaintiff, a merchant at Liverpool, and a creditor of the Calcutta firm. On the same day the Calcutta firm wrote to the plaintiff informing him of the directions they had given to the defendants. On the 12th of March, 1841, the defendants wrote to the plaintiff

(a) See *Malcolm v. Scott*, 3 Mac. & G. 29; S. C., 2 H. & T. 440.

1850.
MALCOLM
v.
SCOTT.

ces viâ Colombo, China, and Mauritius, to enable you to dispose of the following sums from our general account with you. Although we are pretty confident you will be in possession of funds, we are not certain, and do not, in consequence, grant drafts. We are desirous of remitting Cs. Rs. 100,000 to Mr. George Malcolm, as if by a draft to-day at ten months date, at exchange 2s. 1½d. per Cs. Rs. 10,625l., which would fall due in London 19th November next; Cs. Rs. 50,000, to your Mr. W. Scott for his loan to the writer, dated as above, at exchange 2s. 1½d., 53l. 12s. 10d., together 15,937l. 10s. Should you be in possession of funds, we have to request the favour of your holding these sums at Mr. Malcolm's and your own disposal, respectively, under the discount of the Bank of England rate. We shall know to a certainty, in a short time, whether funds sufficient will be transmitted to you to meet these sums on or before the 19th of November next; and should it appear to us that there will not be enough, we shall send you a remittance from this to go to credit of your general account.

“ADAM, SCOTT, & Co.”

On the same day the Calcutta firm also wrote to the plaintiff as follows:—

“Calcutta, 16th January, 1841.

“My dear Sir,—Before we can make up our accounts here we must be put in possession of all the accounts from you, relative to the transactions of the Calcutta firm up to 30th April last, and I am unable, in consequence, to say how our cash account will stand, so as to enable me to regulate the remittance of your stock and that standing in my own name; but being anxious to make some funds available to you, I have written officially to Messrs. Scott, Bell, & Co. to hold at your disposal, on or before the 19th of November next, 10,625l., being the equivalent of Cs. Rs. 100,000, exchange 2s. 1½d. Our friends will hold this

amount at your disposal under discount immediately after the receipt of this, or as soon as they are in possession of funds.

"J. S. B. SCOTT."

1850.
MALCOLM
v.
SCOTT.

In consequence of the letter written by the Calcutta firm to the defendants, the defendants wrote the following letter to the plaintiff:—

"London, 12th March, 1841.

"We beg to advise you that, by the overland letters from India, received yesterday, we are requested by Messrs. Adam, Scott, & Co., to account to you for the equivalent of Cs. Rs. 100,000, at 2s. 1½d. per rupee, ten months after the date of their letter (16th January last), or to hold the amount at your disposal under discount at the Bank of England rates, if convenient to us, and provided we are in funds from their consignments and remittances viâ Colombo, China, and the Mauritius. At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you.

"SCOTT, BELL, & Co."

On the 12th of March, 1841, the plaintiff wrote to the defendants a letter, of which the following is alone material to the present question:—

"Messrs. Adam, Scott & Co. inform us, in their letter of the 16th January last, received this morning by the overland mail, that they had written to you to hold at our disposal on or before the 19th November next, 10,625*l*., and that you would hold this amount at our disposal under discount, immediately after receipt of their letter, or as soon

1850.
MALCOLM
v.
SCOTT.

as you were in possession of funds. Would you have the goodness to let us know whether you will allow us to draw on you for the whole amount due on the above date, or for a part at a shorter date?

“GEORGE MALCOLM & Co.”

On the 13th of March, 1841, the plaintiff wrote as follows to the defendants, inclosing the letter of the 16th January, from Mr. J. S. B. Scott to him:—

“Liverpool, 13th March, 1841.

“I am favoured with your letter of yesterday. It may be proper to inform you, that the money which Messrs. Adam, Scott, & Co. request you to hold at my disposal, namely, Cs. Rs. 100,000 or 10,625*L* cash, 19th of November next, is a portion of my own funds, which I expected to have received direct. In ordering the payment through you, they will, of course, make due provision for it; and although they could not know how much of the amount might be realised by you at dates prior to the 19 November, there is no doubt expressed at your being, ere that time, in funds for the whole. There is evidently no reason to suppose anything else than that ample remittances are on the way, or that they will be received in good time; but in order to prevent any uncertainty or mistake on this point, Messrs. Adam, Scott & Co.’s attention may be drawn to the subject by letters by next overland mail, so that there may be a timely correction of any oversight or miscalculation on their part. The inclosed letter from J. S. B. Scott (which please return) will shew that he intended to make the money available to me; and indeed he could not but know that it must be both inconvenient and disadvantageous to me to be deprived of the use of so considerable a sum for eight months longer. Should you be disposed to give effect to his views and arrangements, by granting acceptances due 19th November, as proposed in G. Malcolm & Co.’s letter of yesterday, they will engage to make due refund of

ny part of the money short remitted from Calcutta; but I have no apprehension of any such short remittance.

“GEORGE MALCOLM.”

1850.
MALCOLM
v.
SCOTT.

On the 14th of March, 1841, the defendants wrote to the Calcutta firm as follows:—

“London, 14th March, 1841.

“Dear Sirs,—Acknowledging the receipt of various letters, and amongst others the following, 16th January, requesting us to account to Mr. Malcolm for the equivalent of 100,000 rupees, at 2s. 1½d., 10,625*L*, ten months from the date of your letter, or should we possess funds of yours, arising from your consignments or remittances *viâ* Colombo, China, and the Mauritius, to discount the same at Bank rates, you will be aware before you receive this, that the present state of your account, and of the advances of consignments and remittances coming forward from other quarters, added to the liabilities we may be under on account of your silk piece goods speculation, will not warrant our meeting this requisition for the present; but should we be in a position to meet it before November next, we shall have pleasure in doing so, and have written to Mr. Malcolm accordingly. The other transfer alluded to in your letter was made on the 31st of December last, agreeably to instructions from Mr. Adam in July last, acknowledged by your No. 100, of 27th October.

“SCOTT, BELL & Co.”

On the 15th March, 1841, the defendants wrote to the plaintiff as follows:—

“London, 15th March, 1841.

“Dear Sir,—Replying to your letter of the 13th instant, we beg to state that we have no specific knowledge of the remittances *viâ* China and the Mauritius, referred to by Messrs. Adam, Scott & Co.; but as a series of about a dozen of their letters are not yet come forward, they may, perhaps, contain the necessary information; and we can

1850.
MALCOLM
v.
SCOTT.

only repeat what we said on the 12th, that when remittances or consignments come forward, we shall lose no time in advising you. Meanwhile it would not be convenient for us to lend our names to acceptances in the manner you propose.

“SCOTT, BELL & Co.”

On the 3rd of April, 1841, the plaintiff wrote to the Calcutta firm the following letter:—

“Liverpool, 3rd April, 1841.

“On receipt of your Mr. Scott’s letter to Mr. Malcolm, dated 16th January, we addressed Messrs. Scott, Bell & Co. on the subject of your order to them to hold at our disposal, on or before the 19th November next, 10,625*l.*, being the equivalent of the Company’s rupees 100,000, at the exchange of 2*s.* 1½*d.* They informed us in reply, that, with reference to the state of your account with them, they must decline for the present making any payment or granting any acceptance on account of your said order. You will readily conceive the disappointment and the serious inconvenience it is to us to be deprived of the use of so considerable a sum of money. We rely on your taking immediate measures to make the above sum, together with any other money due on Mr. Malcolm’s account, or on our general account, available to us, by remittances to ourselves direct, and not to make the payment to us dependent on the position of your London account, which it must be difficult for you to estimate exactly, owing to the uncertainty as to the out-turn of your produce remittances.

“GEORGE MALCOLM.”

On the 20th April, 1841, the Calcutta firm wrote to the defendants a letter, the material part of which is as follows:—

“Calcutta, 20th April, 1841.

“We have now made our entries in conformity with the statements of our account-current, forwarded in your let-

ters Nos. 5 and 6, both of which appear to be correct; and we beg to wait upon you with further statement of our London exchange account up to this date, shewing at credit side 57,205*l.* 12*s.* 4*d.*; at debit side, 39,690*l.* 17*s.* 4*d.*, ditto dependencies 34,919*l.* 6*s.* 11*d.*=74,610*l.* 4*s.* 3*d.*; balance in our favour, 17,404*l.* 11*s.* 11*d.*, against which will come our conditional order of 10,000*l.* in favour of Mr. Malcolm.

“ADAM, SCOTT & Co.”

1850.
MALCOLM
v.
SCOTT.

On the 1st June the Calcutta firm wrote to the plaintiff as follows:—

“Dear Sir,—Your letter, No. 438, of the 3rd April, informs us that our London friends, Messrs. Scott, Bell & Co., on being applied to by you on the subject of our order to them to hold at your disposal, on or before 19th November next, 10,625*l.*, had declined, for the present, making any payment or granting any acceptances on account of such order, and conveyed to us the expression of your disappointment, and a request that we may immediately make remittances to yourselves direct of the above amount, with any other money due to your Mr. Malcolm and on your general account. We are ourselves much disappointed at this proceeding on the part of our London friends, who have likewise advised us of it, and stated their wish to meet the order before November, should they find themselves warranted by the state of our account in doing so. We do not doubt in the least they will be in a position to pay the amount from the proceeds of our shipments to them; and were it even otherwise, the presence of Mr. Scott would, we are assured, accommodate the matter; so that we do not think it necessary to notice further your request for remittances to yourselves direct.

ADAM, SCOTT, & Co.”

By a letter, dated the 18th January, 1842, from the Cal-

1850.
MALCOLM
v.
SCOTT.

cutta firm to the defendants, and received by them on the 10th March, 1842, the former revoked the order for the appropriation of their general remittances in payment of the 10,625*l.* to the plaintiff.

It was ordered by the Lord Chancellor, that, for the purposes of this action, the defendants should admit that the amount realised by them from the consignments and remittances of the Calcutta firm, made before the 18th January, 1842, after liquidating claims existing on the 12th March, 1841, exceeded the amount of the plaintiff's demand; and that the plaintiff should admit that the engagements and liabilities of the defendants on account of the Calcutta firm were such as at all times to exceed the amount realised by them from such consignments and remittances.

It was submitted on the part of the defendants, that the correspondence did not create any contract by them to pay the amount claimed to the plaintiff; and the learned Judge being of that opinion, nonsuited the plaintiff, reserving leave for him to move to enter a verdict, if the Court should be of opinion that he was entitled to recover. In the following Easter Term the *Attorney-General* obtained a rule nisi accordingly; against which

Martin (with whom was *Watson* and *Cowling*) for the defendants, now shewed cause, and submitted, that it was evident from the terms of the correspondence, that the defendants never intended to bind themselves at all events to pay the amount in question to the plaintiff out of the remittances and consignments; but that they reserved to themselves the option of paying, when there was, on the general account, a balance in favour of the Calcutta firm.

The Court then called on

The *Attorney-General*, *Crompton*, and *Mellish*, to support the rule.—The plaintiff is not bound to prove a positive contract on the part of the defendants to pay over the mo-

1850.
MALCOLM
v.
SCOTT.

ney; it is enough to shew an attornment by the defendants to the order of the Calcutta firm. By their letter of the 16th January, 1841, the Calcutta firm request the defendants to hold the sum in question at the plaintiff's disposal, on or before the 19th November; and they add, that if the defendants are not in funds, they will send a remittance to go to the credit of the general account. The defendants, by their letter to the plaintiff of the 12th March, 1841, adopt the order of the Calcutta firm, the terms used at the commencement being, "We beg to advise you," not "When we are in funds we will advise you." Upon the faith of that attornment, the defendants obtain consignments and receive remittances. That the Calcutta firm intended that there should be a binding engagement entered into by the defendants in favour of the plaintiff, is shewn by the letters from that firm to the plaintiff of the 16th January, 1841, and 1st June, 1841. Then the defendants, by their letter to the Calcutta firm of the 14th March, 1841, say: "But should we be in a position to meet it *before* November next, we shall have pleasure in doing so, and have written to Mr. Malcolm accordingly." [*Parke, B.*—The language is vague, and may mean, "if we have funds we will comply with your demand."] It has reference to the defendants' letter to the plaintiff of the 12th March, 1841, in which, after stating that *at present* they were considerably in cash advances for the firm, they add, "We have however *registered* the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." The correspondence shews an appropriation of certain funds, which might or might not come to the defendants' hands, in liquidation of the plaintiff's debt; but when the funds were received, they became the money of the plaintiff, and were held by the defendants for his use. If the plaintiff had drawn upon the defendants for the amount, and they had accepted the draft, the case would have been clear. Then

1850.
MALCOLM
v.
SCOTT.

all that the defendants say by their letter of the 15th March, 1841, is, that having no specific knowledge of the remittances, they do not wish to lend their name to acceptances; that, however, does not affect their engagement to pay over the money when received from the consignments.—They referred to the judgment of Vice-Chancellor *Wigram* in *Malcolm v. Scott* (a).

PARKE, B.—The rule must be discharged. All the letters which form the subject of this case having been brought before us, and having had an opportunity of reading the judgment of Vice-Chancellor *Wigram*, I regret that I cannot concur in the construction put upon the correspondence by that learned Judge. In my opinion it does not amount to a binding engagement by the defendants, *at all events*, to pay over this money to the plaintiff, when they received it from the consignments and remittances. The law is clear. The defendants are under no obligation to pay over the money to the plaintiff, unless they have made a binding agreement with him to do so; and there being a power to the Calcutta firm to countermand the order, this is not money had and received by the defendants for the use of the plaintiff, until they have bound themselves to pay it over. The question then is, whether they have made a binding agreement to that effect, and that turns, as the Vice-Chancellor properly observed, chiefly on the construction of two of the letters, that of the 16th January, 1841, from the Calcutta firm to the defendants, and that of the 12th March, 1841, from the defendants to the plaintiff. In the first instance, the Calcutta firm wrote to the defendants, requesting them to hold the amount in question at the plaintiff's disposal, if sufficient funds should be transmitted. [His Lordship read the above-mentioned letter of the 16th January, 1841.] That was followed by the letter of the 12th March, 1841, in which

the defendants "beg to advise" the plaintiff, that they are requested by the Calcutta firm to hold this money at his disposal, provided they "are in funds from consignments and remittances *viâ* Colombo, China, and the Mauritius." [His Lordship read that portion of the letter of the 12th March, 1841.] That is the order which the Calcutta firm gave to the defendants; and they were under no obligation to pay over the money until they bound themselves by a contract with the plaintiff to do so. The question then is, whether what subsequently occurs in this letter amounts to a contract by the defendants, that they will hold absolutely for the plaintiffs' use all sums received by them from consignments and remittances *viâ* Colombo, China, and the Mauritius. I am clearly of opinion that it does not. The letter is very cautiously worded, and from the terms of it it is evident the defendants did not mean to bind themselves at all events. As to the precise meaning of the expression "registered the above," I do not think it means anything more than that they had taken a note of it. Then what is the effect of the subsequent words, "and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you"? They are somewhat vague, but the defendants say that they will lose no time "*in advising*," not that they will pay it. They in effect say, we do not bind ourselves at all, until we have considered the matter, and then we will advise you. It seems to me, that, upon the true construction of these letters, the defendants have not entered into any positive engagement, but have reserved to themselves the power of paying over the money or not, on a future occasion when the consignments and remittances arrived. The question is purely one for the Court and not for a jury, and the learned Judge who tried the case was right in nonsuiting the plaintiff.

1850.
MALCOLM
v.
SCOTT.

ALDERSON, B.—I am of the same opinion. It seems to

1850.
MALCOLM
v.
SCOTT.

me that the letter of the 12th March, 1841, contains no contract, but only a statement that the defendants had been requested by the Calcutta firm to hold a certain amount at the plaintiff's disposal, and they then proceed to give a civil excuse for their not doing it, viz.—“At the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above; and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you.” Therefore they, in effect, say, “we cannot do it now; we do not mean to make an absolute refusal to do it under any circumstances; but we will register the request on the part of the Calcutta firm, and if remittances or consignments enable us, we will inform you, and will hold the amount at your disposal; but until that event happens, and we intimate our intention of acting, we make no contract at all.”

ROLFE, B., and PLATT, B., concurred.

Rule discharged.

1850.

RICHARDSON and Others, Executors of HARRALL, v.
WORSLEY.

June 18.

DEBT on an award. Plea, never indebted.

At the trial, before Lord *Campbell*, C. J., at the last Warwickshire Spring Assizes, it appeared that J. Harrall, the plaintiff's testator, and the defendant had entered into an agreement of reference, by which, after reciting that differences and disputes had arisen between the parties relating to certain accounts for building materials, work and labour, &c., it was agreed that all the differences, acts, matters, things, and disputes should be referred to the award of an arbitrator named, to the end that the parties might be finally concluded by the arbitration and award, "and that the costs thereof, and of this agreement, and of the reference and award, shall be in the discretion of the said arbitrator, and be defrayed as he shall direct." The arbitrator awarded that the defendants should pay to J. Harrall the sum of 483*l.* 18*s.* 7½*d.*, but made no award as to the costs. It was submitted on the part of the defendant, that the award was on that account bad. The learned judge directed a verdict for the plaintiffs, reserving leave for the defendant to move to enter a nonsuit.

An agreement of reference contained a stipulation "that the costs of the agreement, and of the reference and award, should be in the discretion of the arbitrator, and be defrayed as he should direct." The arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs:—*Held*, that the award was therefore bad.

A rule nisi having been obtained accordingly,

Whitehurst and *Mellor* now shewed cause.—The award is good. The terms of the submission do not render it obligatory on the arbitrator to award respecting the costs, but leave it to his discretion; and as he has made no mention of them, each party will have to pay his own costs. Where, by an order of reference, the arbitrator was to determine what he should think fit to be done by either of the parties, it was held by a majority of this Court, that he was not bound to direct affirmatively that something should be done, unless he should

1850.
 RICHARDSON
 v.
 WORSLEY.

so think fit: *Angus v. Redford* (a). [Alderson, B.—There it was not clear that anything was to be done; here there must of necessity be some costs.] Where an action by a reversioner for incumbering his close was referred to an arbitrator, who was to direct how the verdict was to be entered, and to say what should be done between the parties respecting the land or premises, it was held that the arbitrator was not bound to direct anything to be done: *Grenfell v. Edgcome* (b). But the arbitrator has in effect ordered the costs to be paid to Harrall, for a sum is awarded to him, which must be taken to include costs. It is objected that the award leaves it uncertain which party is to pay the arbitrator; but the answer is, either that is the affair of the arbitrator only, or, as it was in the power of the arbitrator to say in what manner he was to be paid, he has, by omitting all directions on that point, disentitled himself to receive anything. [Platt, B., referred to *George v. Lousley* (c). Alderson, B.—The meaning of the agreement of reference is, that the arbitrator shall award respecting the costs; but that it shall be in his discretion to direct in what manner they shall be paid.] The costs formed no part of the consideration for the reference. In *Morgan v. Smith* (d), the language of the submission imported a distinct condition that the arbitrator should ascertain the costs; here, the word “discretion” governs the whole sentence. [Rolfe, B.—The parties certainly intended that there should be an adjudication as to the costs; who is to pay the expense of the award?] The party who takes it up. [Alderson, B.—He does that upon the faith that the arbitrator will inform him in what manner the costs are to be paid.]

Humfrey appeared to support the rule, but was not called upon.

(a) 11 M. & W. 69.

(b) 7 Q. B. 661.

(c) 8 East, 13.

(d) 9 M. & W. 427.

PER CURIAM (a).—The rule must be absolute to enter a nonsuit.

Rule absolute.

1850.

RICHARDSON
v.
WOMLEY.

(a) *Alderson, B., Rolfe, B., and Platt, B.*

HANSLIP v. PADWICK.

July 8.

COVENANT.—The declaration stated, that on the 22nd November, 1847, by a certain agreement then made between the defendant of the one part, and the plaintiff and one J. Borsley of the other part (profert), after reciting that it was intended to form a joint-stock association, to be called "The Hayling Island Investment Association," for the purpose of erecting houses and other buildings, and establishing a market, for erecting a pier, enlarging, improving, and conducting and managing the ferry and ferry-house, and making

Covenant on an agreement made the 27th September, 1848, whereby the defendant agreed to demise to the plaintiff, on or before the 29th November then next, a ferry and certain messuages and premises, at yearly rents;

and the defendant thereby agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the several premises, and deduce a good title thereto; and the plaintiff agreed to pay to the defendant, on or before the 29th November, 3150*l.* and interest. Averment, that the plaintiff was always ready and willing to perform all things in the agreement on his part to be performed. Breach, that the defendant did not within fourteen days, or at any time, deduce a good title. Pleas, that the plaintiff was not ready and willing to perform all things on his part to be performed; and that the defendant did deduce a good title. It appeared that, on the 17th September, 1850, the plaintiff, who was a solicitor and the promoter of a Company, for making a ferry, erecting gas-works, bathing-houses, &c., at Hayling Island, entered into an agreement with the defendant, the owner of land there, for a demise to the plaintiff of a ferry, land, houses, and premises; and the defendant agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, and deduce a good title thereto; and the plaintiff agreed to pay the defendant, on or before the 29th November, 3150*l.* After the agreement, the Company was provisionally registered by the plaintiff as its promoter. Two abstracts of title were sent by the defendant to the plaintiff, which being objected to, on the 10th November the defendant sent a further abstract, which disclosed a mortgage of the premises intended to be demised to the trustees of the defendant's marriage settlement, one of whom was imbecile: there were also two judgments entered up against the defendant. In consequence of these objections to the title, the association could not proceed with its objects, and was finally dissolved. The 3150*l.* was not paid to the defendant:—*Held*, that the plaintiff was entitled to a verdict on the above issues, and to recover as damages the costs of preparing, stamping, and entering into the agreement; the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted; but not the expenses of raising the 3150*l.*, and loss of interest; nor the expenses of preparing the Company's deed of settlement, and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the association, nor the profits he would have derived from being employed as solicitor by the association, nor as to any advantage which he might have derived from his time, labour, &c., bestowed in the formation of the association.

1850.

HANSLIP
v.
PADWICK.

other public works and improvements, at Hayling Island; and that the defendant was lord of the manor of Hayling, and was also seised to himself and his heirs for an estate of inheritance in fee simple in possession of the ferry and right of ferry and conveyance unto and from the said island across Langston Harbour, and as such lord was also entitled to the collecting of tolls and dues for passengers; and that the parties to the agreement of the second part, in consideration of the defendant entering into the contract and agreement with them thereafter contained, and granting to them or their nominees the lease or leases and privileges thereafter mentioned, were desirous and were determined forthwith, or as soon as conveniently might be, to form the said association, or otherwise to carry into effect the contemplated objects thereof; it was by the said agreement witnessed, and the defendant for himself, his heirs, &c., agreed with the plaintiff and Borsley, their nominees, &c., to enter into an agreement under his hand and seal, whereby the defendant, his heirs, &c., should covenant with the parties to the agreement of the second part, their nominees, &c., to the purport and effect that the defendant would, on or before the 29th September then next, upon the payment to the defendant, his heirs, &c., of 8250*l.*, grant, demise, and lease to the parties of the second part, for a term of ninety-six years from the 25th December, 1848, the said ferry, and certain messuages and premises, &c., particularly described.—The declaration then set out a second agreement between the same parties, and of the same date, whereby, after similar recitals, the defendant agreed to demise to the parties of the second part, for the same term, certain parcels of land, situate at South Hayling. The declaration then set out a third agreement, dated the 27th September, 1848, between the defendant of the first part, the plaintiff of the second part, and Borsley of the third part (profert), by which, after reciting the above two agreements, and that the defendant and plaintiff had mutually agreed to abandon so much of them as related to certain

messuages, &c., therein mentioned, it was witnessed, that the defendant, for the consideration therein mentioned, agreed that he would, on or before the 29th November then next, demise to the plaintiff, his nominees, &c., the ferry-house and ferry, a certain dwelling-house, a bathing-house, the privilege of erecting a pier, of holding a market, &c., for the term in the first two agreements mentioned, at certain yearly rents and payments. And the defendant, by the third agreement, agreed within fourteen days from the date thereof, to furnish an abstract of his title to the said several premises, and deduce a good title thereto; and for the considerations aforesaid, the plaintiff on his part thereby agreed that he would, in consideration of the covenants and agreements of the defendant therein contained, pay or cause to be paid to him, or his heirs, &c., on or before the 29th of November then next, 3150*l.*, and interest at 5*l.* per cent.—Averments, that the plaintiff was always ready and willing to perform all things in the three agreements mentioned on his part to be performed, and to pay the defendant 3150*l.* and interest, upon having a good title deduced by the defendant to the premises. Breach, that the defendant did not nor would, within fourteen days from the date of the third agreement, furnish to the plaintiff an abstract of the defendant's title to the said ferry-house, ferry, buildings, messuages, &c., but wholly neglected and refused so to do.—The declaration then alleged special damage, in the terms mentioned in the questions as below stated for the opinion of this Court.

Second plea.—That the plaintiff was not ready and willing to perform all things to be performed, modo et forma; concluding to the country.

Third plea.—As to so much of the declaration as relates to the defendant's not deducing a good title to the premises in the declaration mentioned—that the defendant did deduce a good title to the premises in the declaration mentioned,

1850.
HANSLLIP
v.
PADWICK.

1850.
HASELIP
v.
PADWICK.

according to the terms of the said agreement; concluding to the country.—Upon which pleas issues were joined.

The cause came on for trial before Lord *Denman*, C. J., at the Hampshire Summer Assizes, 1849, when a verdict by consent was taken for the plaintiff for the full amount of the damage stated in the declaration, subject to the opinion of the Court upon a case, in substance as follows:—

After the making of the third agreement, dated the 27th of September, 1848, the Company was formed, and on the 25th of October, 1848, it was provisionally registered by the plaintiff as its promoter, its purpose being registered to be, “To make a ferry between the Island of Hayling (Hampshire) and Cumberland Fort Point, by means of a floating or other bridge over the creek leading into Langston Harbour. To erect gas works to supply any part of the island with gas-lights, as may be required. To erect water-works in the island, to supply the inhabitants with fresh water. To purchase lands and buildings by licence from the Board of Trade, where required. To enable members and other persons, by loans or otherwise, to purchase or build houses and buildings, and take lands for building and other purposes at Hayling Island. To erect boarding and bathing houses and baths. To erect a market; also a quay and piers, and to make other improvements along the esplanade ranging along the front of the sea beach of the said island.” In October, 1848, the plaintiff caused to be sent to the defendant a prospectus of the plan and purposes of the association, which prospectus had been prepared some time previously. The prospectus was then submitted to the defendant, who made certain alterations therein, which alterations were not adopted by the plaintiff.

On the 14th October, 1848, the first abstract of title was delivered by the defendant to the plaintiff. This abstract contained the Act of Parliament (6 Geo. 4, c. lxxvii., passed in 1825) enabling the Duke of Norfolk to sell to the defendant,

and stating a compliance with the terms of the Act, but no abstract was given, or mention made of any title deeds, mortgages, or incumbrances. The plaintiff laid this abstract before counsel, who made certain requisitions and objections as to the title. On the 9th November the defendant sent to the plaintiff a second abstract, which consisted of a copy of an agreement between the Board of Ordnance and the defendant. On the 10th November the defendant sent to the plaintiff a third abstract of title, which consisted of an abstract of the mortgage to the trustees of the defendant's marriage settlement of the premises intended to be demised to the plaintiff. The plaintiff laid these further abstracts before counsel, who were still of opinion that the title was not marketable. One of the trustees of the defendant's marriage settlement was imbecile, and it appeared that two judgments had been obtained against the defendant. A long negotiation and correspondence took place, with a view to obviate the objections, in the course of which the defendant declined to apply to the Court of Chancery for a conveyance under the direction of the Court from the imbecile trustee. On the 30th November a meeting of the persons interested in the proposed Company was held, when a resolution was unanimously passed, that the promoters could not proceed with the objects of the association. On the same day the plaintiff gave the defendant notice of this resolution, and that he abandoned the contract, and looked to him for damages. Some further correspondence took place, and on the 1st of December the defendant proposed to pay off the mortgage, but on the 5th of December the Company was finally dissolved, and the provisional registration cancelled.

Upon the above facts the first question for the opinion of the Court is, whether the plaintiff has or has not established the affirmative of the issue joined upon the second plea of the defendant. The second question is, whether the defen-

1850.
HANSLIP
v.
PADWICK.

1850.
HANSLIP
v.
PADWICK.

dant has or has not established the affirmative of the issue joined on the third plea of the defendant.

If the Court is of opinion that the plaintiff is entitled to recover, either by reason of his having established the affirmative of the issue joined upon the second plea, and the defendant's having failed to establish the affirmative of the issue joined upon the third plea; or by reason of the insufficiency of the second and third pleas, or either of such pleas, to bar the plaintiff's right of action; or by reason of his having established the affirmative of the issue upon the second plea, or of the defendant's having failed in establishing the issue joined on the third plea, and the insufficiency of the other of such pleas, then the Court is requested and empowered to determine the principles upon which the damages to which the plaintiff is entitled shall be assessed by the Master.

If the Court is of opinion that the plaintiff has not established the affirmative of the issue joined upon the second plea, and that the defendant has established the affirmative of the issue joined upon the third plea, and the Court is also of opinion that the plea or pleas upon which the plaintiff has failed and the defendant has succeeded, is or are sufficient in law to bar the plaintiff, then a nonsuit is to be entered.

The plaintiff claims, First—The costs and expenses incurred by him in and about the preparing, stamping, and entering into the several agreements mentioned in the declaration.

Secondly—The expenses in and about investigating the alleged title of the defendant to the said premises, and in endeavouring to procure a good title thereto, and to procure the leases to be granted.

Thirdly—His expenses in and about obtaining, raising, and procuring the sum of 3150*l.* and interest, and loss of interest thereon; which sum was to have been paid to the

defendant on the granting of the said leases at the time specified in the agreements.

Fourthly—His expenses in and about preparing the deed of settlement for the intended association, and making the same public, and which expenses were incurred by him subsequently to the execution of the last-mentioned agreement, and in reliance upon the faithful fulfilment thereof, the contract being, as appears by the said agreements, for the purpose of forming a joint-stock Company, to be called “The Hayling Island Improvement Association.”

Fifthly—The debts incurred and money expended in and about the formation of the association, and incidental thereto, and in registering the same provisionally on the faith of the performance by the defendant of his covenants in the agreements, incurred subsequently to the execution thereof.

Sixthly—The loss of the profits which he would reasonably have derived from the granting of the lease by the defendant and the establishment of the association, and of all profits he would have derived from being employed by the said proposed association to carry out the intended objects thereof as an attorney and solicitor; and all the use, benefit, and advantage which he otherwise might and would have derived from the time, labour, trouble, care, journeys, and attendances by him given, expended, performed, and bestowed in, upon, and about the formation of the association, and in preparing to carry the same and the objects of the agreement into effect.

Butt argued for the plaintiff (June 28).—The plaintiff is entitled to judgment. The defendant has clearly failed to deduce a good title, for his abstract shews that the premises were mortgaged to two trustees, one of whom was imbecile. It is true that, on the 1st of December, the defendant proposed to pay off the mortgage, but he was bound to furnish an abstract and deduce a good title on the 11th of October. Besides, there were two judgments standing

1850.
HANS LIP
v.
PADWICK.

1850.
 HANSLIP
 v.
 PADWICK.

against the defendant, and the concurrence of the judgment creditors to the conveyance was never obtained. [*Alderson*, B.—There is no distinction in Courts of law between matter of title and matter of conveyance.] Then with respect to the damages, they are to be assessed on the principle that the plaintiff is entitled to be reimbursed for all loss resulting from the defendant's breach of contract.

Shapter for the defendant.—The argument on behalf of the plaintiff confounds the question of title with that of conveyance. The defendant was ready to pay off the mortgage, and to give such a title as a reasonable person would accept. The 11 Geo. 4 & 1 Will. 4, cc. 60, 65, provides for the case of a conveyance by a lunatic mortgagee. [*Rolfe*, B.—The fact of the defendant having the power to do something which has not been done, does not remove the objection to the title.] The question of title is a question of dominion over the estate. In *Shaw v. Rowley* (a), the plaintiff, who had sold shares on which calls were due, and which by the 8 & 9 Vict. c. 16, s. 16, could not be transferred until the calls were paid, was held entitled to recover the price of them, as he was in a condition to make a transfer of them by paying the calls before the purchase-money became due. [*Alderson*, B.—The title there was not in a third person.] *Stowell v. Robinson* (b) decided that the failure to procure from the lessor a licence to assign, or to register previous assignments before the day on which it was agreed to assign and give possession of leasehold premises, was not a breach of the agreement. In *Avarne v. Browne* (c), Sir L. Shadwell, V. C., held, "that where an abstract shews that the equitable title is vested in the vendor, and that the legal estate in fee and a mortgage term are outstanding in certain persons, it shews a good title; and though the owner of the legal estate in fee, or the termor

(a) 16 M. & W. 810. (b) 3 Bing. N. C. 928. (c) 14 Sim. 303.

1850.
 HANSLIP
 v.
 PADWICK.

and the person representing him, may subsequently die, yet that a good title is shewn when it is shewn that the vendor has the whole equity, and in what person the outstanding portion of the legal estate is vested." [Alderson, B.—Is there any case *at law* where, the legal estate being outstanding, it has been held that the abstract shewed a good title?] A Court of law takes notice of an equitable interest. In *Tempest v. Kilner*(a), Maule, J., says, "Suppose a man contracts to assign to another an equitable interest in land, could not the latter maintain an action on that contract? A contract of this kind must be construed in the same way at law and in equity. The title was complete on the 10th November, when the defendant delivered the last abstract. [Rolfe, B.—The contract was to deduce a good title on the 11th October.] [Alderson, B.—At law, time is always of the essence of the contract; in equity, the contract is considered as a purchase of land for money, without reference to the time at which the title is to be made out.] Then, with respect to the damages, the plaintiff is only entitled to recover such as are immediately consequential. In *De Visme v. De Visme*(b), Lord Cottenham, C., says, "The purchaser is to have compensation for the loss and injury which he sustained by the non-performance of the contract by the vendors; but they, the vendors, are not therefore to make compensation for any loss not arising out of their contract." In this case, it was no part of the contract that a Company should be formed. [Rolfe, B.—The plaintiff is proceeding for a breach of contract which took place on the 11th October, and cannot recover for any damages resulting from his endeavours to form the Company after that period.]

Butt replied.

(a) 2 C. B. 300.

(b) 1 Macn. & G. 353.

1850.
HANSLEY
v.
PADWICK.

ALDERSON, B.—We have no difficulty as to the way in which the issues should be entered, for the plaintiff is clearly entitled to a verdict upon both. We will take time to consider how the damages are to be assessed. According to my present impression, the plaintiff is entitled only to the two first heads.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—We intimated at the time of the argument our opinion, that on the facts of this case the plaintiff was entitled to recover; but we reserved our opinion as to the damages. We have since considered this point, and we think the damages must be confined to the two first heads mentioned in the case, which are these:—"The costs and expenses of the plaintiff, incurred by him in and about preparing, stamping, and entering into the several agreements mentioned in the declaration. The expenses incurred in and about investigating the alleged title of the defendant to the premises, and in endeavouring to procure a good title thereto, and to procure the leases to be granted." The third, fourth and fifth items are damages incurred by the plaintiff by his own imprudence in beginning to act before he had ascertained whether the defendant could or could not complete his contract; and the sixth, which is loss of profit, is too remote a subject of damage to be allowed at all under any circumstances like those in this case.

Judgment for the plaintiff accordingly.

1850.

ARCHER v. BAYNES.

July 8.

ASSUMPSIT for goods sold and delivered.—Plea, non assumpsit.

At the trial, before *Alderson*, B., at the last Liverpool Spring Assizes, it appeared that, in September, 1849, the defendant, who was a flour dealer at Lancaster, verbally agreed to purchase, by sample, of the plaintiff, a corn-merchant at Liverpool, thirty-three barrels of flour, at 21s. 6d. per barrel, to be sent to the defendant at Lancaster by the London and North Western Railway. The flour was accordingly sent, and the plaintiff afterwards received the following letter from the defendant :

“ Lancaster, October 2nd, 1849.

“ Dear Sir,—This is to say that I have received thirty-three R. H. barrels, per London and North Western Railway, but from whom I cannot tell, and have enclosed sample, say No. 1 is of the barrels received, and No. 2 is of the sample I bought the barrels by, by which you will see the barrels is not near as fine as the sample ; beside, they are very hard in the barrels. I hope you have not sent them for what I bought, as they are not the barrels I bought, nor shall I have them. Will you please write me per first mail to-morrow about them, and say if you have sent them. Yours truly,

E. BAYNES.”

“ The barrels I saw was not hard, same as what I have received.”

the purchase. What was forwarded you was the same you saw. Under these circumstances you cannot, therefore, object to fulfil your agreement.” The defendant replied as follows :—“ I beg to say the barrels I have received is not the same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them :”—*Held*, that the letters did not constitute a sufficient note or memorandum in writing of the contract within the 17th section of the Statute of Frauds.

The defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating, that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows :—“ Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk ; and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed

1850.
 ARCHER
 v.
 BAYNES.

To that the plaintiff replied, inclosing an invoice, as follows :

“ Liverpool, October 3rd, 1849.

“ Sir,—Annexed you have invoice of the flour sold you last Friday, and which was forwarded per railway to your address same day, agreeably to your instructions. In reply to your letter of this, or rather last post, I am, I must say, very much astonished at your finding any fault with the flour. It was sold to you, subject to your examining the bulk; and it was not until after you had examined it and satisfied yourself both of quality and condition, that you confirmed the purchase. The flour was in Messrs. Gregg’s warehouse when you saw it, and under their care, and their warehouseman says you saw as many barrels as you wished to look at, and that what was forwarded to you was the same you saw. Under these circumstances, you cannot therefore object to fulfil your agreement; but in order that no unpleasantness may arise out of the transaction, I am satisfied to cancel the sale, provided you will place the flour in the same warehouse here that it was sent from, free of any expense to me; this without prejudice to my claim or any part thereof, and subject to your reply in course.

“ I am, Sir, yours respectfully,

“ WILLIAM ARCHER.”

“ Liverpool, 28th September, 1849.

“ Mr. Edward Baynes.

“ Bought of William Archer, payment cash, less three months’ interest.

“ Thirty-three barrels Ohio flour, at 21s. 6d.

per 196 lbs.	.	.	£35	9	6
Less 47 lbs. short weight	.	.	0	5	2
			<hr/>		
			£35	4	4”
			<hr/>		

The defendant wrote in answer as follows :—

“ Lancaster, October 10th, 1849.

“ Dear Sir,—This is to say that I duly received yours in reply; beg to say that the barrels I have received is not the same as I saw; I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the sample. Any person you may appoint is at liberty to come and examine them; if you will take them back and pay carriage, I will with pleasure send them. There must be some mistake about them. I cannot tell what-ever to do with them.

Yours truly,

“ E. BAYNES.”

1850.
ARCHER
v.
BAYNES.

It was objected, on behalf of the defendant, that there was no sufficient note or memorandum in writing to satisfy the Statute of Frauds; and the learned Judge, being of that opinion, directed a nonsuit, reserving leave for the plaintiff to move to enter a verdict for the amount claimed. A rule nisi having been obtained accordingly,

Willes and *Hugh Hill* shewed cause (June 21).—The letters and invoice do not constitute a sufficient note or memorandum in writing of the contract to satisfy the 17th section of the 29 Car. 2, c. 3. *Egerton v. Mathews* (a), and *Wain v. Warlters* (b), establish the distinction between the 4th and 17th sections of that statute. By the former, the whole contract must be in writing, including the consideration; but by the latter it is sufficient if all the terms by which the vendee is bound are stated in writing. Now here, though the plaintiff's letter of the 3rd of October, coupled with the invoice, does contain a statement of the terms of a contract, yet that is not adopted by the defendant. A

(a) 6 East, 307.

(b) 5 East, 10.

1860.

ABOHER
v.
BAYNES.

disclaimer of a contract has never been held to be a memorandum within that statute: *Cooper v. Smith* (a). This case is governed by *Richards v. Porter* (b), where the plaintiff sent to the defendant an invoice of hops, and delivered the invoice to a carrier to be conveyed to the defendant. In the invoice the plaintiff was described as the seller, and the defendant as the purchaser, of the hops. The defendant afterwards wrote to the plaintiff as follows:—"The hops which I bought of Mr. Richards (the plaintiff), on the 23rd of last month, are not yet arrived, nor have I heard of them. I received the invoice. The last was much longer than they ought to have been on the road; however, if they do not arrive in a few days, I must get some elsewhere, and consequently cannot accept them;" and it was held, that the invoice and letter taken together did not constitute a sufficient note in writing within the statute. Where, indeed, the vendee, by his letter in answer, recognises and adopts the terms of a contract specified in the vendor's letter, that, no doubt, is a sufficient memorandum to satisfy the statute: *Jackson v. Lowe* (c), *Smith v. Surman* (d); but that is not the case here.

Watson and *T. Jones*, in support of the rule.—It is necessary to keep in view the distinction between the contract itself and the performance of it. The defendant, by his letter of the 10th of October, admits that there was a contract, but complains that the flour sent was not according to sample. The statute does not absolutely exclude parol evidence, and it may be introduced to shew that the contract between the parties was that contained in the invoice and letter of the 3rd of October: *Johnson v. Dodgson* (e). The true principle is stated by Lord Denman, C. J., in *Dobell v. Hutchinson* (f), viz. "that where a con-

(a) 15 East, 103.

(b) 6 B. & C. 437.

(c) 1 Bing. 9.

(d) 9 B. & C. 561.

(e) 2 M. & W. 658.

(f) 3 A. & E. 371.

tract in writing, or note, exists, which binds one party, any subsequent note in writing, signed by the other, is sufficient to bind him, provided it either contains in itself the terms of the contract, or refers to any writing which contains them." *Saunderson v. Jackson* (a) shews that these letters connected together constitute a sufficient note in writing. *Jackson v. Lowe* (b) is not distinguishable from the present case. The parties do not differ as to the terms of the contract, but only as to whether the flour sent is that which has been sold. Upon every principle of construction, that imports the fact of a sale.

1850.
 }
 ARCHER
 v.
 BAYNES.

Cur. adv. vult.

ALDERSON, B., now said—There was a case of *Archer v. Baynes*, tried before me at the last Liverpool Assizes, in which a motion was made to enter a verdict for the plaintiff for 35*l.* 4*s.* 4*d.*, the admitted amount of the damages. At the trial, the plaintiff was nonsuited on the ground that there was no sufficient note or memorandum in writing of any contract to take the case out of the Statute of Frauds; and that question, having been reserved, was argued before the three Judges who are now present in Court (c), and we are of opinion that the rule must be discharged. No doubt, if the letter of the plaintiff of the 3rd of October, and of the defendant in answer, taken together, contained a sufficient contract, namely, one that would express all its terms, they would constitute a memorandum in writing within the statute. We have no difficulty, therefore, in coming to the conclusion that these letters may be looked at for the purpose of seeing whether or not they contain a sufficient contract to take the case out of the statute; but looking at them, we do not think they do. They do not express all the terms of the contract; and the case is in truth governed by

(a) 2 B. & P. 238.

(b) 1 Bing. 9.

(c) *Alderson, B., Rolfe, B., and Platt, B.*

1850.

ARCHER

v.

BAYNES.

Richards v. Porter, which was cited in the course of the argument, and in which Lord *Tenterden* gave a similar decision as to a document of a similar nature which was then before him. There is a distinct refusal on the part of the defendant to accept the flour which he had bought of the plaintiff. It is clear from the letters that he had bought the flour from the plaintiff upon some contract or other; but whether he bought it on a contract to take the particular barrels of flour which he had seen at the warehouse, or whether he had bought them on a particular sample which had been delivered to him, on the condition that they should agree with that sample, does not appear; and that which is in truth the dispute between the parties is not settled by the contract in writing; and therefore the rule must be discharged.

Rule discharged.



In the Matter of GORHAM v. THE BISHOP OF EXETER.

Under the 25 Hen. 8, c. 19, an appeal lay from the Archbishop's Court to the Delegates in all spiritual causes, whether touching the King or not; and, therefore, by the 2 & 3 Will. 4, c. 92, there is now an appeal, in such cases, to the

Judicial Committee of the Privy Council, whose decision is final.

Semble, that the 9th section of 24 Hen. 8, c. 12, which, in matters touching the King, gives an appeal from certain Ecclesiastical Courts to the Upper House of Convocation, is repealed by the 25 Hen. 8, c. 19.

Quære,—Whether a proceeding by duplex querela is a "matter touching the King" within the 24 Hen. 8, c. 12, s. 9.

or of his episcopal or consistorial court, or from proceeding to enforce or give effect to any monition, citation, or other process requiring the said bishop or officers aforesaid to transmit or cause to be transmitted to the registry of the said Arches Court or elsewhere, the letters of presentation of her Majesty, under the Great Seal, bearing date the 2nd of November, 1847, addressed to the said Lord Bishop of Exeter, and presenting the Rev. George Cornelius Gorham, clerk, for admission, institution, and induction, by or under the authority of the said bishop, to the vicarage of Bramford Speke, in the county of Devon and in the diocese of Exeter; and also to prohibit the said Sir Herbert Jenner Fust and the said Archbishop of Canterbury, and each of them, from admitting, instituting, or inducting, or authorising the admission, institution, or induction of the said George Cornelius Gorham to the said vicarage, or otherwise observing, complying with, or in any way proceeding to give effect to or carrying into execution a certain order of her said Majesty in Council, on or about the 9th of March, 1850, upon a certain report or recommendation of the Judicial Committee of the Privy Council, in a certain cause or alleged cause of appeal from the judgment of the said Arches Court in a suit of duplex querela between the said George Cornelius Gorham, clerk, and the said Lord Bishop of Exeter, and which said report or recommendation was made to her said Majesty by the said Judicial Committee of the Privy Council on or about the 8th of March, 1850.

The affidavits in support of the application stated the following facts:—The vicarage of Bramford Speke, in Devonshire, is a benefice with cure of souls in the diocese of Exeter. The patronage and right of presentation belong to the Queen, who, in right of her Crown, is seised in fee of the advowson as one in gross. On the 3rd of March, 1847, the vicarage became void by death; and on the 2nd of November, 1847, the benefice remaining so void, the

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

Queen, as patron, in right of the Crown, did, by letters patent of that date, present to the Bishop of Exeter the Reverend George Cornelius Gorham as her Majesty's clerk appointed to the said vicarage, commanding the bishop to admit the said G. C. Gorham thereto, and to institute, induct, and invest him, and do all other matters concerning the admission, institution, and induction which to the bishop's pastoral office belonged.

The bishop, by his affidavit, stated, that he as such bishop as aforesaid is the ordinary, and hath full ecclesiastical and spiritual jurisdiction in and over the said vicarage and the vicar thereof for the time being; and that, as such bishop and ordinary, he has full and sole right and authority by law to admit, institute, and induct, or to authorise the admission, institution and induction of, each and every person from time to time presented by her Majesty, as such patron as aforesaid, for admission &c. into the said vicarage as the vicar thereof; and that, before such admission &c., he, as such bishop and ordinary, has also the full and sole right and authority by law, and it is moreover his bounden duty and obligation, to examine the person so presented, and to ascertain and determine, as the spiritual judge, the fitness and qualifications of such person for such admission &c., with reference as well to his faith and doctrine as to his learning, morals, ability, and sufficiency, according to the laws ecclesiastical of this realm; and in the event of his finding and determining, upon such examination, that the person so presented is unfit or disqualified, by reason of his insufficiency in any of the matters aforesaid, then to refuse to admit, institute, or induct such person. That, on the presentation by her Majesty of the said G. C. Gorham, and after receipt of the said letters patent, the bishop, as such bishop and ordinary, according to his said right and duty in that behalf, examined the said G. C. Gorham, in order to ascertain and determine whether he was fit and qualified, according to the laws ecclesiastical of this realm, to be admit-

ted &c. to the said vicarage; and that upon such examination deponent ascertained and determined, according to his conscientious judgment and belief, that the said G. C. Gorham did then hold, maintain, and affirm certain unsound doctrines and opinions, contrary to the true christian faith, and contrary to and inconsistent with the doctrines of the Church of England, the Thirty-nine Articles of Religion, and the Book of Common Prayer, authorised and enjoined by the Act of Uniformity (13 & 14 Car. 2, c. 4); and that, by reason and in consequence of the said G. C. Gorham so holding, maintaining, and affirming such doctrines and opinions, the deponent as such bishop and ordinary did then adjudge and determine that the said G. C. Gorham was, as the deponent still believes him to be, a person unfit and unqualified to be admitted &c. to the said vicarage; and that such holding, maintaining, and affirming such doctrines and opinions as aforesaid was a lawful and sufficient cause for the deponent's refusing to admit &c. the said G. C. Gorham to the said vicarage; and, by reason thereof, the deponent, as such bishop, &c. thereupon refused to admit the said G. C. Gorham to the said vicarage, or to institute, induct, or invest him &c.

The bishop gave notice to her Majesty of his refusal; and in Trinity Term, 1848, the said G. C. Gorham commenced a suit of duplex querela against the bishop in the Arches Court of Canterbury (a), such suit being in the nature of an appeal from the said judgment and determination of the bishop as such bishop and ordinary. The suit was heard by the Dean of the Arches and Official Principal, Sir Herbert Jenner Fust; and on the 2nd of August, 1849, he gave judgment, that the said G. C. Gorham did hold and maintain such unsound doctrines and opinions as aforesaid, and that, by reason thereof, he was unfit and unqualified to be

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

(a) 2 Rob. Eccl. Cas. 1.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

admitted &c. to the said vicarage; and that the bishop had shewn sufficient reason for refusing to admit, &c. : and the defendant was dismissed with costs.

The said G. C. Gorham appealed from that judgment to the Queen in Council, and petitioned her Majesty, "that the said judgment might be reversed and annulled; and that the said G. C. Gorham might be declared to be fit and qualified to be, and might be, admitted, &c. to the said vicarage." Her Majesty referred the petition to the Judicial Committee, and they heard counsel on both sides on the petition, and on or about the 8th of March, 1850, reported to the Queen that the judgment of Sir Herbert Jenner Fust ought to be reversed; and that it ought to be declared that the bishop had not shewn sufficient cause why the said G. C. Gorham should not be admitted, &c.; and that the principal cause ought to be remitted to the Court of Arches, in order that right might be there done.

The Queen, by order in Council, 9th of March, 1850, approved of the report, and directed that it should be carried into execution. In pursuance of that order, the cause was remitted to the Arches Court; and the Official Principal, in order to carry the recommendation of the Judicial Committee of the Privy Council into effect, caused the registrar of the Episcopal Court to be served with a monition to return into the Arches Court the letters patent by which the said G. C. Gorham was presented to the bishop for admission, &c. A copy of the monition was also served upon the bishop, who now deposed that he was informed and believed, that the last-mentioned Order in Council was about to be enforced, and the admission to take place, unless a prohibition were granted.

The bishop's affidavit also stated, that since the hearing of the said appeal by the said Judicial Committee, he had been advised by counsel that the said G. C. Gorham was not entitled to appeal from the said judgment of the Arches Court to the Queen in Council, nor had her Majesty power

or authority by law to refer the petition to the Judicial Committee, nor had the Judicial Committee power to hear or report thereon; and that her Majesty had not power, &c., to make the said Order in Council of the 9th March, 1850, nor the Official Principal to give it effect, nor the Archbishop of Canterbury to admit, &c.; but that the appeal and all the proceedings thereon were void, and the judgment of the Arches Court still in force. That he was not, before or at the time of the hearing of the said appeal before the Judicial Committee of the Privy Council, nor for some time afterwards, informed or aware that the said G. C. Gorham was not entitled or allowed by law to appeal to her Majesty in Council against the said judgment, or that the said matters and proceedings had, or likely to be had thereon, were or would be null and void in law; and that he had no opportunity, and was not able, at any time before or during the hearing of the said appeal, to object to or protest against the jurisdiction or authority of her Majesty, or of the said Judicial Committee, in the matters aforesaid."

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

In last Easter Term (April 25th), the Bishop of Exeter made a similar application for a prohibition to the Court of Queen's Bench (*a*); and that Court, after taking time for consideration, refused to grant a rule. Later in the same Term (May 2), application was made to the Court of Common Pleas (*b*); and that Court also, after consideration, refused to grant a rule.

The *Attorney-General*, *Greenwood*, and *Cowling*, shewed cause (*c*).—The case involves two questions: First, whether the 9th section of the 24th Hen. 8, c. 12, is incorporated with the 25th Hen. 8, c. 19: Secondly, if it be, whether this is a cause, matter, or contention touching the Queen. The

(*a*) 15 Q. B. 52.

(*b*) 9 C. B.

(*c*) The rule was argued June

29th, and July 1st and 2nd, before *Pollock*, C. B., *Alderson*, B., *Rolfe*, B., and *Platt*, B.

1850.

In re
GOREHAM
v.
BISHOP OF
EXETER.

Court cannot fail to see that the object of this application is to revive the authority of the Convocation, a proceeding which is thus denounced as a dangerous experiment by Burke, in his Letter to the Sheriffs of Bristol: "We know that the Convocation of the clergy had formerly been called, and sat with nearly as much regularity to business as Parliament itself. It is now called for form only. It sits for the purpose of making some polite ecclesiastical compliments to the king; and when that grace is said, retires, and is heard of no more. It is, however, a part of the constitution, and may be called out into act and energy whenever there is occasion, and whenever those who conjure up that spirit, will choose to abide the consequences. It is wise to permit its legal existence; it is much wiser to continue it a legal existence only." In considering these questions, it is important to observe the discrepancy between the arrangement of the sections of the 24 Hen. 8, c. 12, on the original record, and as usually printed. That statute, as engrossed on the original record, consists of four sections only(a): the first comprises the 1st, 2nd, and 3rd sections

(a) In the edition of the Statutes printed by command of his Majesty King George the Third, in pursuance of an address of the House of Commons, the 24 Hen. 8, c. 12, stands thus:—"An Act that the appeals in such cases as have been used to be pursued to the See of Rome shall not be from henceforth had ne used but within this realm."—"Where, by divers sundry old authentic histories and chronicles, it is manifestly declared and expressed, that this realm of England is an empire, and so hath been accepted in the world, governed by one supreme head and king, having the dignity and royal estate of

the imperial crown of the same, unto whom a body politic, compact of all sorts and degrees of people, divided in terms and by names of spirituality and temporality, been bounden and owen to bear, next to God, a natural and humble obedience; he being also institute and furnished, by the goodness and sufferance of Almighty God, with plenary, whole, and entire power, pre-eminence, authority, prerogative, and jurisdiction, to render and yield justice and final determination to all manner of folk, resiants or subjects within this his realm, in all causes, matters, debates, and contentions happening to occur, in-

of the statute as printed in the ordinary editions; the second is the same as the 4th; the third comprises the 5th, 6th,

1850.

In re
GOREHAM
v.
BISHOP OF
EXETER.

surge, or begin within the limits thereof, without restraint or provocation to any foreign princes or potentates of the world: The body spiritual whereof having power, when any cause of the law divine happened to come in question, or of spiritual learning, then it was declared, interpret, and shewed by that part of the said body politic called the spirituality, now being usually called the English church, which always hath been reputed and also found of that sort, that both for knowledge, integrity, and sufficiency of number, it hath been always thought, and is also at this hour, sufficient and meet of itself, without the intermeddling of any exterior person or persons, to declare and determine all such doubts, and to administer all such offices and duties, as to their rooms spiritual doth appertain; For the due administration whereof, and to keep them from corruption and sinister affection, the king's most noble progenitors, and the antecessors of the nobles of this realm, have sufficiently endowed the said church both with honour and possessions: And the laws temporal, for trial of property of lands and goods, and for the conservation of the people of this realm in unity and peace without ravyn or spoil, was and yet is administered, adjudged, and executed by sundry judges and administrators of the other part of the said body politic, called the tem-

poralty; and both their authorities and jurisdictions do conjoin together in the due administration of justice, the one to help the other: And whereas the king, his most noble progenitors, and the nobility and commons of this said realm, at divers and sundry Parliaments, as well in the time of King Edward the First, Edward the Third, Richard the Second, Henry the Fourth, and other noble kings of this realm, made sundry ordinances, laws, statutes, and provisions for the entire and sure conservation of the prerogatives, liberties, and pre-eminences of the said imperial crown of this realm, and of the jurisdictions spiritual and temporal of the same, to keep it from the annoyance as well of the see of Rome, as from the authority of other foreign potentates, attempting the diminution or violation thereof, as often, and from time to time, as any such annoyance or attempt might be known or espied: And notwithstanding the said good statutes and ordinances made in the time of the king's most noble progenitors, in preservation of the authority and prerogative of the said imperial crown, as is aforesaid; yet, nevertheless, sithen the making of the said good statutes and ordinances divers and sundry inconveniences and dangers, not provided for plainly by the said former acts, statutes, and ordinances, have arisen and sprung by

1850.

In re
GORHAMv.
BISHOP OF
EXETER.

and 7th; and the fourth includes the 8th, 9th, and 10th. The 1st section prohibits appeals to the see of Rome, in

reason of appeals sued out of this realm to the see of Rome in causes testamentary, causes of matrimony and divorces, right of tithes, oblations and obventions, not only to the great inquietation, vexation, trouble, costs, and charges of the king's highness, and many of his subjects and residents in this his realm, but also to the great delay and let to the true and speedy determination of the said causes, for so much as the parties appealing to the said court of Rome most commonly do the same for the delay of justice: And forasmuch as the great distance of way is so far out of this realm, so that the necessary proofs, nor the true knowledge of the cause, can neither there be so well known, nor the witnesses there so well examined, as within this realm, so that the parties grieved by means of the said appeals be most times without remedy: "In consideration whereof, the king's highness, his nobles and commons, considering the great enormities, dangers, long delays and hurts, that as well to his highness as to his said nobles, subjects, commons, and residents of this his realm, in the said causes testamentary, causes of matrimony and divorces, tithes, oblations and obventions, do daily ensue, doth therefore by his royal assent, and by the assent of the lords spiritual and temporal, and the commons, in this present Parliament assembled, and by autho-

rity of the same, enact, establish, and ordain, that all causes testamentary, causes of matrimony and divorces, rights of tithes, oblations and obventions, the knowledge whereof, by the goodness of princes of this realm, and by the laws and customs of the same, appertaineth to the spiritual jurisdiction of this realm, already commenced, moved, depending, being, happening, or hereafter coming in contention, debate, or question within this realm, or within any the king's dominions or marches of the same, or elsewhere, whether they concern the king our sovereign lord, his heirs or successors, or any other subjects or residents within the same, of what degree soever they be, shall be from henceforth heard, examined, discussed, clearly, finally, and definitively adjudged and determined within the king's jurisdiction and authority, and not elsewhere, in such courts spiritual and temporal of the same as the natures, conditions, and qualities of the causes and matters aforesaid in contention, or hereafter happening in contention, shall require, without having any respect to any custom, use, or sufferance, in hindrance, let, or prejudice of the same, or to any other thing used or suffered to the contrary thereof by any other manner of person or persons in any manner of wise; any foreign inhibitions, appeals, sentences, summonses, citations,

three cases: viz. "in causes testamentary, causes of matrimony and divorces, rights of tithes and oblations." The

1850.
In re
GORHAM
v.
BISHOP OF
EXETER

suspensions, interdictions, excommunications, restraints, judgments, or any other process or impediments, of what natures, names, qualities, or conditions soever they be, from the see of Rome, or any other foreign courts or potentates of the world, or from and out of this realm, or any other the king's dominions or marches of the same, to the see of Rome, or to any other foreign courts or potentates, to the let or impediment thereof in anywise notwithstanding. And that it shall be lawful to the king our sovereign lord, and to his heirs and successors, and to all other subjects or resiants within this realm, or within any of the king's dominions or marches of the same, notwithstanding that hereafter it should happen any excommengements, excommunications, interdictions, citations, or any other censures or foreign process out of any outward parts, to be fulminate, promulged, declared, or put in execution within this said realm, or in any other place or places, for any of the causes before rehearsed, in prejudice, derogation, or contempt of this said Act, and the very true meaning and execution thereof, may and shall nevertheless as well pursue, execute, have, and enjoy the effects, profits, benefits, and commodities of all such processes, sentences, judgments, and determinations done, or hereafter to be done, in any of the said

courts spiritual or temporal, as the cases shall require, within the limits, power, and authority of this the king's said realm and dominions and marches of the same, and those only and none other to take place, and to be firmly observed and obeyed within the same: As also, that all the spiritual prelates, pastors, ministers, and curates within this realm and the dominions of the same, shall and may use, minister, execute, and do, or cause to be used, executed, ministered, and done, all sacraments, sacramentals, divine services, and all other things within the said realm and dominions, unto all the subjects of the same, as Catholic and Christian men owen to do; any former citations, processes, inhibitions, suspensions, interdictions, excommunications, or appeals, for or touching the causes aforesaid, from or to the see of Rome, or any other foreign prince or foreign courts, to the let or contrary thereof in any wise notwithstanding. And if any of the said spiritual persons, by the occasion of the said fulminations of any of the same interdictions, censures, inhibitions, excommunications, appeals, suspensions, summons, or other foreign citations for the causes before said, or for any of them, do at any time hereafter refuse to minister or cause to be ministered the said sacraments and sacramentals and other divine services in form as

1850.

In re
GORHAM

v.

BISHOP OF
EXETER.

2nd section enforces that enactment by the imposition of penalties. The 3rd section provides for the mode of ap-

is aforesaid, shall for every such time or times that they or any of them do refuse so to do or cause to be done, have one year's imprisonment, and to make fine and ransom at the king's pleasure.

2. "And it is further enacted by the authority aforesaid, that if any person or persons inhabiting or resiant within this realm, or within any of the king's said dominions, or marches of the same, or any other person or persons, of what estate, condition, or degree soever he or they be, at any time hereafter, for or in any of the causes aforesaid, do attempt, move, purchase, or procure, from or to the see of Rome, or from or to any other foreign court or courts out of this realm, any manner of foreign process, inhibitions, appeals, sentences, summons, citations, suspensions, interdictions, excommunications, restraints, or judgments, of what nature, kind, or quality soever they may be, or execute any of the same process, or do any act or acts to the let, impediment, hindrance, or derogation of any process, sentence, judgment, or determination had, made, done, or hereafter to be had, done, or made, in any courts of this realm, or the king's said dominions or marches of the same, for any of the causes aforesaid, contrary to the true meaning of this present Act and the execution of the same, that then every such person or persons so

doing, and their fantors, comforters, abettors, procurers, executors, and counsellors, and every of them, being convict of the same, for every such default shall incur and run in the same pains, penalties, and forfeitures ordained and provided by the Statute of Provision and Præmunire, made in the sixteenth year of the reign of the right noble prince King Richard II., against such as attempt, procure, or make provision to the see of Rome, or elsewhere, for anything or things to the derogation or contrary to the prerogative or jurisdiction of the crown and dignity of this realm.

3. "And furthermore, in eschewing the said great enormities, inquietations, delays, charges, and expenses hereafter to be sustained in pursuing of such appeals and foreign process, for and concerning the causes aforesaid or any of them, do therefore by authority aforesaid ordain and enact, that in such cases where heretofore any of the king's subjects or resiants have used to pursue, provoke, or procure any appeal to the see of Rome, and in all other cases of appeals, in or for any of the causes aforesaid, they may and shall from henceforth take, have, and use their appeals within this realm, and not elsewhere, in manner and form as hereafter ensueth, and not otherwise; that is to say, first from the archdeacon

peals within this realm, viz. from the archdeacon, if the cause began there, to the bishop diocesan; from the bishop dio-

or his official, if the matter or cause be there begun, to the bishop diocesan of the said see, if in case any of the parties be grieved; And like wise if it be commenced before the bishop diocesan or his commissary, from the bishop diocesan or his commissary, within fifteen days next ensuing the judgment or sentence thereof there given, to the Archbishop of the province of Canterbury, if it be within his province, And if it be within the province of York, then to the Archbishop of York, and so likewise to all other archbishops in other the king's dominions,"as the case by the order of justice shall require; and there to be definitively and finally ordered, decreed, and adjudged, according to justice, without any other appellation or provocation to any other person or persons, court or courts: And if the matter or contention for any of the causes aforesaid be or shall be commenced, by any of the king's subjects or resiants, before the archdeacon of any archbishop, or his commissary, then the party grieved shall or may take his appeal, within fifteen days next after judgment or sentence there given, to the Court of the Arches or audience of the same archbishop or archbishops; and from the said Court of the Arches or audience, within fifteen days then next ensuing after judgment or sentence there given, to the archbishop of the same

province, there to be definitely and finally determined, without any other or further process or appeal thereupon to be had or sued.

4. "And it is further enacted by the authority aforesaid, that all and every matter, cause, and contention now depending, or that hereafter shall be commenced by any of the king's subjects or resiants for any of the causes aforesaid, before any of the said archbishops, that then the same matter or matters, contention or contentions, shall be before the same archbishop where the said matter, cause, or process shall be so commenced, definitively determine, decreed, or adjudged, without any other appeal, provocation, or any other foreign process out of this realm, to be sued to the let or derogation of the said judgment, sentence, or decree, otherwise than is by this Act limited and appointed. Saving always the prerogative of the Archhishop and church of Canterbury, in all the foresaid causes of appeals to him and to his successors, to be sued within this realm, in such and like wise as they have been accustomed and used to have heretofore: And in case any cause, matter, or contention now depending for the causes before rehearsed, or any of them, or that hereafter shall come in contention for any of the same causes, in any of the foresaid courts, which hath, doth, shall, or may touch the

1850.

In re
GORNHAM
v.
BISHOP OF
EXETER.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

cesan, if commenced before him, then within fifteen days to the archbishop, and there to be definitely adjudged; or if commenced before the archdeacon of any archbishop, to the Court of Arches, and from that Court to the archbishop of the province, there to be definitely adjudged. The 4th section, in that part which corresponds with the 8th of the ordinary editions, enacts, that causes commenced before any archbishop shall be by him "definitely determined." Then

king, his heirs or successors, kings of this realm, that in all and every such case or cases the party grieved, as before is said, shall or may appeal from any of the said Courts of this realm, where the said matter now being in contention, or hereafter shall come in contention, touching the king, his heirs or successors, as is aforesaid, shall happen to be ventilate, commenced, or begun, to the spiritual prelates and other abbots and priors of the Upper House, assembled and convocate by the king's writ in the Convocation being or next ensuing within the province or provinces where the same matter of contention is or shall be begun; So that every such appeal be taken by the party grieved within fifteen days next after the judgment or sentence thereupon given or to be given. And that whatsoever be done, or shall be done and affirmed, determined, decreed, and adjudged by the foresaid prelates, abbots, and priors of the Upper House of the said convocation, as is aforesaid, appertaining, concerning, or belonging to the king, his heirs and successors, in any of these fore-

said causes of appeals, shall stand and be taken for a final decree, sentence, judgment, definition, and determination, and the same matter, so determined, never after to come in question and debate, to be examined in any other court or courts: And if it shall happen any person or persons hereafter to pursue or provoke any appeal contrary to the effect of this Act, or refuse to obey, execute, and observe all things comprised within the same, concerning the said appeals, provocations, and other foreign processes to be sued out of this realm, for any the causes aforesaid, that then every such person or persons so doing, refusing or offending, contrary to the true meaning of this Act, their procurers, fautors, advocates, counsellors, and abettors, and every of them, shall incur into the pains, forfeitures, and penalties ordained and provided in the said statute made in the said sixteenth year of King Richard II., and with like process to be made against the said offenders as in the same statute made in the said sixteenth year more plainly appeareth."

the portion corresponding with the 9th section says, that in any cause depending "in any of the aforesaid Courts," that is, those Courts mentioned in the 3rd section, if the matter touches the king, the appeal shall be to the Upper House of Convocation. The argument on the other side in substance is, that the 24 Hen. 8, c. 12, having taken away the right of appeal in three sorts of spiritual cases, and transferred it to certain tribunals within the realm, when the 25 Hen. 8, c. 19, extended that enactment to all spiritual cases, it necessarily extended the provisions of the 4th section, by which, in the case of matters touching the king, the appeal is to go to the Upper House of Convocation. But the foundation of that argument fails, because there is no appeal where the suit is originally commenced in the Archbishop's Court. And it may be here observed, that the sentence of divorce of the king from Queen Katherine of Arragon, pronounced by Archbishop Cranmer, and which is found in the life of Henry VIII. by Lord Herbert of Cherbury, p. 347 (a), follows the language

1850.
In re
GOSHAM
v.
BISHOP OF
EXETER.

(a) The part of the sentence referred to is as follows:—"Idcirco nos Thomas Archiepiscopus Primas et Legatus antedictus, Christi nomine primitus invocato, ac solum Deum præ oculis nostris habentes, pro nullitate et invaliditate dicti matrimonii pronunciamus, decernimus, et declaramus, ipsumque prætentum matrimonium fuisse et esse nullum et invalidum, ac divino jure prohibente contractum et consummatum, nulliusque valoris aut momenti esse, sed viribus et firmitate juris caruisse et carere; præfatisque illustrissimo et potentissimo principi Henrico Octavo ac Serenissimæ Dominæ Catharinæ non licere in eodem prætenso matrimonio remanere etiam pronun-

ciamus, decernimus et declaramus, ipsosque, illustrissimum et potentissimum principem Henricum Octavum et serenissimam dominam Catherinam, quatenus de facto et non de jure dictum prætentum matrimonium ad invicem contraxerunt et consummarunt, ab invicem separamus et divortiamus, atque sic separatos et divortiatos, necnon ab omni vinculo matrimoniali respectu dicti prætensi matrimonii, liberos et immunes fuisse et esse pronunciamus, decernimus, et declaramus per hanc nostram *sententiam diffinitivam*, sive hoc nostrum *finale decretum*, quam sive quod ferimus et promulgamus in his scriptis."

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

of the first part of the 4th section of the 24 Hen. 8, c. 12. [*Alderson*, B.—Might there not be an appeal from the Delegates to the Convocation? In *Havor v. Thorol* (a), *Richardson*, C. J., draws a distinction between the words “definitive” and “final.” He observes, that, notwithstanding the 25 Hen. 8, c. 19, renders the sentence of the Delegates “definitive,” the king may grant a commission of review; but that it would have been otherwise if the statute had said that the sentence of the Delegates should be “final.” Also in Gibson’s Codex, tit. xlv. c. vi. p. 1038, it is said, “When the case of the royal power to grant a review came under consideration, 4 Car. 1, two things were observed by *Richardson* in favour of the prerogative: first, that the words of this statute are *no further appeals to be had*, and that the commission of review seems not to be an appeal, but only a *suspension* of the former sentence; secondly, that whereas the words of the 24 Hen. 8, in case of the archbishops, are, that the cause shall be *finally adjudged and finally determined*; and in case of the Upper House of Convocation, that their decree *shall be final, and never after come in question and debate*; here, in the case of the king, the expression is only *definitive*, (which, in the language of the common and canon law, doth not exclude *further* consideration); and that *no further appeals shall be had*, which exclude not a review in virtue of a new commission.” *Pollock*, C. B.—The passage in 4 Institute, 341, is to the same effect.]

But assuming that under the 9th section of the 24 Hen. 8, c. 12, an appeal lay from the Archbishop’s Court to the Upper House of Convocation in matters touching the Crown, that enactment is not incorporated with the 25 Hen. 8, c. 19 (b), but is virtually repealed by it. The pre-

(a) Litt. Rep. 228.

(b) In the edition of the Statutes printed by command of his Majesty King George the Third, in pursuance of an address of

the House of Commons, the 25 Hen. 8, c. 19, stands thus:—“An Act for the Submission of the Clergy to the King’s Majesty.” —‘Where the king’s humble and

amble of the latter statute shews that the Convocations of the clergy were usurping the prerogative of the Crown. Up

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

obedient subjects, the clergy of this realm of England, have not only knowledged according to the truth, that the Convocations of the same clergy is, always hath been, and ought to be assembled only by the king's writ, but also submitting themselves to the king's majesty, have promised in *verbo sacerdotii*, that they will never from henceforth presume to attempt, allege, claim, or put in ure, or enact, promulge, or execute any new canons, constitutions, ordinance provincial, or other, or by whatsoever other name they shall be called, in the Convocation, unless the king's most royal assent and licence may to them be had, to make, promulge, and execute the same, and that his majesty do give his most royal assent and authority in that behalf: And where divers constitutions, ordinances, and canons, provincial or synodal, which heretofore have been enacted, and be thought not only to be much prejudicial to the king's prerogative royal, and repugnant to the laws and statutes of this realm, but also over much onerous to his highness and his subjects, the said clergy hath most humbly besought the king's highness, that the said constitutions and canons may be committed to the examination and judgment of his highness, and of thirty-two persons of the king's subjects, whereof sixteen to be of the Upper and Nether House of the Parliament

of the temporalty, and the other sixteen to be of the clergy of this realm, and all the said thirty-two persons to be chosen and appointed by the king's majesty; and that such of the said constitutions and canons as shall be thought and determined by the said thirty-two persons, or the more part of them, worthy to be abrogated and annulled, shall be abolite and made of no value accordingly; and such other of the same constitutions and canons as by the said thirty-two, or the more part of them, shall be approved to stand with the laws of God, and consonant to the laws of this realm, shall stand in their full strength and power, the king's most royal assent first had and obtained to the same: 'Be it therefore now enacted by authority of this present Parliament, according to the said submission and petition of the said clergy, that they ne any of them from henceforth shall presume to attempt, allege, claim, or put in ure any constitutions or ordinances, provincial or synodal, or any other canons; nor shall enact, promulge, or execute any such canons, constitutions, or ordinances provincial, by whatsoever name or names they may be called, in their Convocations in time coming, which alway shall be assembled by authority of the king's writ, unless the same clergy may have the king's most royal assent and licence to make, promulge,

1850.

In re
GOREHAMv.
BISHOP OF
EXETER.

to the time of its passing, they had been in the habit of occasionally assembling without the King's writ, and of dis-

and execute such canons, constitutions, and ordinances, provincial or synodal; upon pain of every one of the said clergy doing contrary to this act, and being thereof convict, to suffer imprisonment, and make fine at the king's will.

2. "And forasmuch as such canons, constitutions, and ordinance as heretofore hath been made by the clergy of this realm, cannot now at the session of this present Parliament, by reason of shortness of time, be viewed, examined, and determined by the king's highness, and thirty-two persons to be chosen and appointed according to the petition of the said clergy in form above rehearsed: Be it therefore enacted by authority aforesaid, that the king's highness shall have power and authority to nominate and assign, at his pleasure, the said thirty-two persons of his subjects, whereof sixteen to be of the clergy, and sixteen to be of the temporality of the Upper and Nether House of the Parliament. And if any of the said thirty-two persons so chosen shall happen to die before their full determination, then his highness to nominate other from time to time of the said two houses of the Parliament, to supply the number of the said thirty-two; and that the same thirty-two, by his highness so to be named, shall have power and authority to view, search, and examine the said canons, constitutions, and ordinance,

provincial and synodal, heretofore made, and such of them as the king's highness and the said thirty-two, or the more part of them, shall deem and adjudge worthy to be continued, kept, and obeyed, shall be from thenceforth kept, obeyed, and executed within this realm, so that the king's most royal assent under his Great Seal be first had to the same; and the residue of the said canons, constitutions, and ordinance provincial, which the king's highness, and the said thirty-two persons, or the more part of them, shall not approve, or deem and judge worthy to be abolite, abrogate, and made frustrate, shall from thenceforth be void and of none effect, and never be put in execution within this realm.

3. "Provided alway, that no canons, constitutions, or ordinances shall be made or put in execution within this realm by authority of the Convocation of the clergy, which shall be contrariant or repugnant to the king's prerogative royal, or the customs, laws, or statutes of this realm, anything contained in this act to the contrary hereof notwithstanding.

4. "And be it further enacted by authority aforesaid, that, from the feast of Easter, which shall be in the year of our Lord God 1534, no manner of appeals shall be had, provoked, or made out of this realm, or out of any of the king's dominions, to the Bishop of Rome,

curring whatever matters the archbishops thought fit to propose: Wake's "State of the Church," pp. 11, 14, 17, 485, 439; Gilbert's Exch. 52, 55. They sat for long periods.

1850.
In re
GOREHAM
v.
BISHOP OF
EXETER.

nor to the see of Rome, in any causes or matters happening to be in contention, and having their commencement and beginning in any of the Courts within this realm, or within any of the king's dominions, of what nature, condition, or quality soever they be of; But that all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties grieved, or having cause of appeal, after such manner, form, and condition as is limited for appeals to be had and prosecuted within this realm in causes of matrimony, tithes, oblations and obventions, by a statute thereof made and established sithen the beginning of this present Parliament, and according to the form and effect of the said estatute, any usage, custom, prescription, or any thing or things to the contrary hereof notwithstanding. And for lack of justice at or in any the Courts of the archbishops of this realm, or in any the king's dominions, it shall be lawful to the parties grieved to appeal to the king's majesty in the king's Court of Chancery; and that upon every such appeal, a commission shall be directed under the Great Seal to such persons as shall be named by the king's highness, his heirs or successors, like as in case of appeal from the Admiral's Court, to hear and definitively

determine such appeals, and the causes concerning the same; which commissioners, so by the king's highness, his heirs or successors, to be named or appointed, shall have full power and authority to hear and definitely determine every such appeal, with the causes and all circumstances concerning the same; and that such judgment and sentence as the said commissioners shall make and decree, in and upon any such appeal, shall be good and effectual, and also definitive, and no further appeals to be had or made from the said commissioners for the same.

5. "And if any person or persons, at any time after the said feast of Easter, provoke or sue any manner of appeals, of what nature or condition soever they be of, to the said Bishop of Rome, or to the see of Rome, or do procure or execute any manner of process from the see of Rome, or by authority thereof, to the derogation or let of the due execution of this Act, or contrary to the same, that then every such person or persons so doing, their aiders, counsellors, and abettors, shall incur and run into the dangers, pains, and penalties contained and limited in the Act of Provision and Præmunire made in the sixteenth year of the king's most noble progenitor, King Richard II., against such as sue to the court of Rome against the king's crown and prerogative royal.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

On the 5th of November, 1529, the last Convocation of that period was convened, and continued until after the submission of the clergy: Wake's "State of the Church," p. 397. The 24 Hen. 8, c. 12, added to their importance by introducing the anomaly of an appeal to one of the Houses. The 1st section of the 25 Hen. 8, c. 19, prohibits the Convocation from assembling, except by authority of the King's writ; so that if an appeal lay to that Court in matters touching the King, he would have it in his power to impede the course of justice by refusing the writ. Perhaps it will be said, that this argument would equally apply to the House of Lords, which, though a Court of appeal, can-

6. (a) "Provided always, that all manner of provocations and appeals hereafter to be had, made, or taken from the jurisdiction of any abbots, priors, and other heads and governors of monasteries, abbeys, priories, and other houses and places exempt, in such cases as they were wont or might afore the making of this Act, by reason of grants or liberties of such places exempt, to have or make immediately any appeal or provocation to the Bishop of Rome, otherwise called Pope, or to the see of Rome, that in all these cases every person and persons, having cause of appeal or provocation, shall, may take and make their appeals and provocations immediately to the king's majesty of this realm, into the Court of Chancery, in like manner and form as they used afore to do to the see of Rome; which appeals and provocations, so made, shall be definitively determined by authority of the king's com-

mission, in such manner and form as in this Act is above mentioned; so that no archbishop or bishop of this realm shall intermit or meddle with any such appeals, otherwise or in any other manner than they might have done afore the making of this Act; anything in this Act to the contrary thereof notwithstanding.

7. "Provided also, that such canons, constitutions, ordinances, and synodals provincial, being already made, which be not contrariant or repugnant to the laws, statutes, and customs of this realm, nor to the damage or hurt of the king's prerogative royal, shall now still be used and executed as they were afore the making of this Act, till such time as they be viewed, searched, or otherwise ordered and determined by the said thirty-two persons, or the more part of them, according to the tenor, form, and effect of this present Act."

(a) This and the succeeding proviso are inserted in a Schedule annexed to the original Act.

not assemble without being summoned by the Crown; but Sir Matthew Hale has clearly proved that the House of Lords never had an inherent jurisdiction in judicial matters: Sugden on the "Law of Property as administered in H. Lords," c. 1, p. 2. It would be strange, however, if the legislature, in creating a court of appeal, should give to the party appealed against the power of controlling a decision in his favour. Or can it be supposed, that when the legislature was thus curtailing the authority of the Convocation, it meant, by the same enactment, to extend its jurisdiction as a court of appeal? If their appellate jurisdiction was intended to continue or be increased, would there not have been some provision requiring the Crown to summon them as a court of appeal; especially as the 4th section shews that the legislature was awake to the necessity of such a provision? If there is any ambiguity in the language, the Court will construe it rather as superseding the appellate jurisdiction of the Convocation than extending it. The appeal clauses may be considered as distinct from the preceding sections, which are a mere transcript of "The Submission of the Clergy:" Concilia Mag. Brit. Vol. 3, pp. 753, 770. The 2nd section of the 25 Hen. 8, empowers the king to appoint a commission, consisting partly of laymen, to review the canons. Section 3 is general in its terms, and declares that no manner of appeals "of what nature, condition, or quality soever they be of," shall be made out of the realm; but that all appeals, "of what nature or condition soever they be of, or what cause or matter soever they concern," shall be made "after such manner, form, and condition" as is limited for appeals in causes of matrimony, tithes, oblations and obventions, by the 24 Hen. 8, c. 12. The words "manner, form, and condition," must be read in the same sense as the words "nature, condition, or quality." The language of that section is wide enough to include matters touching the Crown: *Rex v.*

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

Wright (a). The 4th section, which, in the correct edition, is only a continuation of the 3rd, gives an appeal from the Archbishop's Court to the Delegates "like as in case of appeal from the Admiral's Court, to hear and definitively determine such appeals, and the causes concerning the same." But there never was an appeal from the Admiralty Court in matters touching the king. The statute is a remedial one, and perhaps meant to give a concurrent jurisdiction to the Convocation and the Delegates, at the option of the parties grieved, or an ultimate appeal from the Delegates to the Convocation; indeed, that is the only way in which *Goodman's case (b)* can be explained. The 6th section is conclusive on this point: it provides that appeals from peculiars shall be made direct to the King in Chancery. Now, matters touching the king may arise as well in peculiars as in diocesan courts; and it would be absurd to say, that in the one case the appeal is to go to the King in Chancery, and in the other to the Convocation.

Some light may be thrown on the construction of these statutes, by considering the circumstances under which they passed. At the beginning of the twenty-fourth year of the reign of Henry 8, the question as to the validity of the king's marriage with Queen Katherine of Arragon was still pending, and she was desirous of appealing to the Pope: Parker de Antiq. Eccl. Brit. 328, ed. 1605. On the other hand, the king was desirous of avoiding that, and therefore caused the 9th section to be inserted in the 24 Hen. 8, c. 12, the effect of which would be to compel her to bring her appeal to the Upper House of Convocation. His reason for selecting that body was, that Archbishop Cranmer had already brought the question of the validity of that marriage before the Convocation, when there appeared a considerable difference of opinion in the Lower House, but in the Upper House a large majority

(a) 1 A. & E. 434.

(b) 3 Dy. 272.

declared it void: Burnet's Hist. Ref. bk. 2, p. 129, ed. 1679. After that session of Parliament was over, Cranmer summoned Queen Katherine to appear before him in his court at Dunstable, and, on her non-appearance, pronounced her marriage void: Life of Henry the Eighth, by Lord Herbert, 347, ed. 1649; Strype's Eccl. Mem. bk. 1, c. 9. Henry, however, found that the clergy could not be relied on, and therefore determined to enforce their "Submission," by passing it into a law, and at the same time to provide an appeal tribunal upon which he could depend. He accordingly caused the 25 Hen. 8, c. 19, to be passed. But whatever was his motive, could it be supposed, that, in providing such a tribunal for other persons, he overlooked his own case?

The earliest contemporaneous exposition of these statutes is found in the Irish Act, 28 Hen. 8, c. 6 (a), in-

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

(a) "Where divers good and wholesome laws and statutes be made and established within the realm of England for the adnulling and utter taking away of appeals in cases spiritual from the Bishop of Rome and See Apostolick, and such other as claim by authority of the same, not only for great speed of justice to the king's subjects of the said realm, but also in taking away the long delays, costs, charges, and expenses that the said subjects sustained by reason of such appeals; and forasmuch as this land of Ireland is the king's proper dominion of England, and united, knit, and belonging to the imperial crown of the same realm, which crown of itself and by itself is fully, wholly, entirely, and rightfully endowed and garnished with all power, authority, and

pre-eminence, sufficient to yield and render to all and singular subjects of the same full and plenary remedies in all causes of strife, debate, contention or division, without any suit, provocation, appeal, or any other process to be had, made, or sued to any foreign prince or potentate, spiritual or temporal: Be it therefore, and for the common weal of the subjects of this land, ordained and enacted by authority of this present Parliament, that no person or persons, subjects or residents of this land, shall, from the first day of this present Parliament, pursue, commence, use, or exercise any manner of provocations, appeals, or other process, to or from the Bishop of Rome, or from the See of Rome, or to or from any other that claim authority by reason of the same,

1850.

In re
GOSHAM
v.

BISHOP OF
EXETER.

titled "An Act of Appeals." The 1st section, after reciting that good laws were made in England, taking away appeals

for any manner of case, grief, or cause, of what nature soever it be, upon the pain that the offenders, their aiders, counsellors, and abettors, contrary to this Act, shall incur and run into such paines, forfeitures, and penalties, as be specified and contained in the Act of Provision and Præmunire, made in the realm of England in the sixteenth year of King Richard the Second, sometime King of England and Lord of Ireland, against such as procure to the Court of Rome, or elsewhere, to the derogation, or contrary to the prerogative or jurisdiction of the said Crown of England; and that no manner of person, subject, or resiant, within this said land, shall attempt, procure, or obtain any manner of process, of what kind or nature soever it be, to or from the same Bishop of Rome, or Court of Rome, or See Apostolick, or from any other having authority by the same, to the let or interruption of this Act, or anything therein contained, nor in anywise obey or execute within this land such manner of process, upon like paines and forfeits as been above rehearsed.

2. "And to the intent that the subjects and resiants of this land shall and may take and hear the appeals in their just and lawful causes, for lack of justice within this land, be it further enacted, by authority of this present Parliament, that in and for

all manner of causes, griefs, and cases, as they or any of them were wont and accustomed to have in their provocations, appeals, and other process, in cases of debate and contention to or from the Bishop of Rome, or to or from the See Apostolick, or Court of Rome, they now being grieved shall have, take, and use, from the first day of this present Parliament, their provocations, appeals, and such like process, to the King of England and Lord of Ireland, his heirs and successors, or to his or their lieutenant, deputie, justice, or other governor, whatsoever he be, of this land of Ireland for the time being, to his or their Court of Chancery within the same realm of England or land of Ireland; and that upon every such provocation, appeal, and process, made to the King of England and Lord of Ireland, and to his heirs and successors, the Chancellor of England or Keeper of the Great Seal for the time being shall grant a commission or delegacy to some discreet and well-learned persons of this land of Ireland, or else in the realm of England, for final determination of all causes and griefs contained in the said provocations and appeals, and in the principal matter, and in all circumstances and dependant thereupon; and that, upon every such provocation, appeal, or process made to the said lieutenant, deputie, justice, or governor, the

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

to Rome in spiritual causes, enacts, that no person shall thereafter appeal to Rome, or obey the process of that court, under penalty of a præmunire. Sect. 2 enacts, that in all cases where appeals were formerly brought to Rome, they shall be taken to the king in England, or to the chief governor of Ireland, to their Court of Chancery in England or Ireland; which shall grant a commission or delegacy for their final determination. It is clear that a Convocation sat in Ireland, to which appeals might have been sent; for the Irish Act, 17 & 18 Car. 2, c. 6, mentions both Houses of Convocation as then assembled in that kingdom. The 28 Hen. 8, c. 6, which was repealed by the Irish Act, 28 Geo. 3, c. 32(a), gave an appeal from the Archbishops' Courts

Chancellor of this said land of Ireland or Keeper of the Great Seal of the same for the time being, by the assent of the Chief Justices of the King's Bench and Common Place, the Master of the Rolls, and the Under Treasurer of the said land for the time being, or any two of them, so as the said Under Treasurer be one, shall grant a commission or delegacy to some discreet and well-learned persons within this land of Ireland, for final determination of all causes and griefs contained in the said provocation and appeals, and in the principal matter, and all circumstances and dependants thereupon, which commissioners so named shall have like power and authority in all manner of things as commissioners assigned in appeals made to the King's Highness in the realm of England have, by authority of their commission, or by virtue of any acts made for appeals within the said realm; any foreign laws,

prohibitions, inhibitions from the Court of Rome, customes, usages, prescription, or any other things to the contrary thereof notwithstanding."

(a) "An Act to repeal an Act passed in the twenty-eighth year of the reign of King Henry the Eighth, intituled 'An Act of Appeals,' and to enable the Lord Chancellor, Lord Keeper, or Lords Commissioners for the custody of the Great Seal of this kingdom for the time being, to issue Commissions of Appeal from the Courts of the Archbishop within the same."

"Whereas it is expedient that an Act passed in this kingdom in the twenty-eighth year of the reign of King Henry the Eighth, intituled 'An Act of Appeals' should be repealed, and that provision should be made for issuing Commissions of Appeal from the Courts of the archbishops of this realm: Be it enacted, &c., that the said recited Act be, and the

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

of that realm to the king in the Court of Chancery in Ireland, upon which a commission was to be directed to hear them.

This construction of the statutes is supported by all the text writers. Ayliffe, in his "*Parergon*" (a), speaking of Ecclesiastical Courts, says, "Among these Courts, that has the first place which depends on the king's commission, as the Court of Delegates does, wherein all causes of appeal by way of devolution from either of the Archbishops, are

same is hereby repealed, and for lack of justice at or in any the Courts of the archbishops of this realm :

2. "Be it enacted by the authority aforesaid, that it shall and may be lawful for the parties grieved to appeal to the king's majesty, his heirs and successors, and that upon every such appeal a commission shall be directed, under the Great Seal of this kingdom, to such persons as shall be named by the king's most excellent majesty, his heirs or successors, in his or their said Court of Chancery, to hear and definitely determine such appeals, and the causes concerning the same, and in such form as hath been used in this realm on appeals to the king's majesty in his said Court of Chancery ; which commissioners so by the king's most excellent majesty, his heirs or successors, to be named or appointed, shall have full power and authority to hear and definitely determine every such appeal, with the causes and all circumstances concerning the same ; and that such judgment and sentence as the said commissioners shall make and decree in and upon any such appeal, shall be good and effec-

tual, and also definitive, and no further appeals to be had or made from the said commissioners for the same ; and if any person or persons, at any time after the passing of this Act, shall provoke or sue any manner of appeals, of what nature or condition soever they be, to the derogation or let of the due execution of this Act, or contrary to the same, every such person or persons so doing, their aiders, councillors, and abettors, shall incur the pains and penalties of *præmunire*, specified and contained in the Act made in the realm of England, in the sixteenth year of the reign of King Richard the Second, against such as sue to the court of Rome against the king's crown and prerogative royal.

3. "And be it declared and enacted by the authority aforesaid, that all commissions which have heretofore issued upon appeals to the king's majesty, or his predecessors, in his or their Court of Chancery of this realm, and all proceedings had under and by virtue of the same, shall be deemed valid and effectual, to all intents and purposes whatsoever."

(a) Page [191] ed. 1726.

decided. But in regard to the jurisdiction of this Court, it has been enacted by Parliament that no appeal shall be made, in causes begun within the realm, to the Court of Rome, or out of the kingdom, for want of justice in the two Archbishops' Courts, but that the party may appeal to the King's Majesty in his High Court of Chancery." In Oughton's "*Ordo Judicorum*," tit. cccii., and in Clarke's "*Praxis in Curiis Ecclesiasticis*," tit. cclxvi., the law is stated thus: "*Omnes appellationes a reverendissimo Cantuariensi Archiepiscopo, vel ab ejus curiis et judicibus, (utpote a Curiis de Arcubus, Audientia, et Prærogativa,) interponendæ sunt ad Regiam Majestatem et Curiam Cancellariæ.*" The law is stated in similar terms in Cockburn's "*Clerk's Assistant*," c. xxix. s. 4, and Conset's "*Practice of the Ecclesiastical Courts*," Part v. chap. 1, s. 1, p. 6. In none of these works is any mention made of an appeal to the Convocation in matters touching the king. Again, "*The Clerk's Instructor in the Ecclesiastical Courts*," which consists of a variety of precedents, is silent on this subject. So likewise Halifax's "*Civil Law*." Nathaniel Bacon, in his work on the "*Government of England*," Part ii. c. 28 (a), speaking of the time of Henry 8, says, "The Parliament reserved the cognizance of all appeals for final sentence unto themselves, and disposed of all the steps thereunto as unto them seemed most convenient. For though it be true, in some cases, the Archbishop of Canterbury had the definitive sentence, and in other cases the Convocation, yet was this but a temporary law, and this also granted to them by the Parliament, which took it away from the Pope, and never interested the Crown therein, but made the Archbishop and the Convocation their immediate delegates, so long as they saw good. Afterwards, when they had done their work, viz. the determining the appeal and divorce of Queen Katherine, and some other matters, the same hand that gave that power took it away, and gave it, (not to the king or

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

(a) Page 133, edit. 1739.

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

Crown), but to delegates from the Parliament from time to time to be nominated by the king; and may as well alter the same and settle the power elsewhere when they please." Again, in c. 30 (a): "For the king's turn once served by the Convocation, and the matter of the divorce of Queen Katherine settled, the king perceiving the slow progress of the Convocation, the members of the same not being yet sufficiently tuned to the present affairs and moderate, Archbishop Cranmer likewise foreseeing that the odium of these definitive sentences would be too great for him to bear, another appeal is provided, more for the honour of the Crown, to be from the Archbishop to Delegates to be appointed by the king, his heirs and successors, so as though their nomination be the king's, yet their power is deduced immediately from the Parliament, which took the same from the Archbishop, and conferred it upon them." That work, though not of legal authority, was compiled from Selden's notes, and is spoken of with approbation by Lord Chatham (b). Also Lord Herbert of Cherbury, in his "Life of Henry the Eighth," says (c): "And as concerning appeals, they shall be made (according to the statutes made the last year) from inferior Courts to the Archbishops, and, for lack of justice there, to the King's Majesty in his Court of Chancery." In 2 Roll. Abridg. 226, tit. "Prerogative le Roy (Y), Le Power de Convocation," no mention is made of an appeal to it under the 24 Hen. 8, c. 12; but, in the same book, p. 232, tit. "Appeale (G) Delegates," it is stated, that, by the 25 Hen. 8, c. 19, an appeal from the Archbishops' Courts is given to the King in Chancery, and no allusion is made to matters touching the Crown. In the British Museum there are seven volumes of a Digest of Statutes, one bearing the name of Rastall, and two of which were compiled previous to the 24 Hen. 8, the rest subsequently. Under the title "Appeal," the 25 Hen. 8 is referred to as giving an appeal to the King in

(a) Page 137, edit. 1739.

Chatham, vol. 1, p. 109, ed. 1838.

(b) Correspondence of Lord

(c) Page 871, ed. 1649.

Chancery in all spiritual matters, but no mention whatever is made of an appeal to the Convocation in matters touching the king. In Hawkins' P. C., bk. 1, c. 19, s. 20, it is said, "The third offence of this nature, viz. that of appealing to Rome from any of the King's Courts, is made a *præmunire* by 24 Hen. 8, c. 12, and cc. 20, 21, and 25 Hen. 8, c. 19, by which it is enacted, 'that all such appeals as formerly were made to Rome, shall from henceforth be made to the High Court of Chancery.'" The same is stated in Bacon's Abridg. "*Præmunire*" (A).

The authorities also support the construction now contended for. In the year 1695, Dr. Watson, Bishop of St. David's, was sued in the Archbishop's Court for simony and other offences; and after sentence of deprivation against him, he appealed to the Delegates; and fearing that they were about to decide against him, he moved the Court of King's Bench for a prohibition, which, however, was refused by the whole Court: *Episcopus St. David v. Lucy* (a). *Holt*, C. J., in delivering judgment said, "The notion of the deprivation of bishops by the Convocation is new, and started by Sir Bartholomew Shower, and (by him) the Convocation has not any such power: and if there was such power in the Convocation, it is presumable that care would have been taken in the Act of Hen. 8, that there should have been an appeal from them." In the report of the same case in *Salkeld* (b), *Holt*, C. J., is stated to have said that the Convocation "was a new fancy of Sir Bartholomew Shower's." The bishop then petitioned the House of Lords (c), on the ground that the sentence of deprivation having been passed by the Archbishop of Canterbury, who had not authority to do it, the bishop had just reason to protect himself by his privilege as a peer. The Attorney-General, in delivering his opinion as to how far the king's supremacy was concerned in the question,

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

(a) 1 Ld. Raym. 539. (b) 1 Salk. 134. (c) 14 How. St. Tr. 455.

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

said, that, "by the 25 Hen. 8, the final appeal in all ecclesiastical causes whatsoever is directed to be from the archbishop to the King in Chancery. It is said, with reference to *Goodman's case*, that there the commission was not issued under the 25 Hen. 8, but by virtue of the general visitatorial prerogative of the crown in ecclesiastical matters; it would seem, however, from two letters of the 22nd of May, 1551, from Dean Turner to Secretary Cecil, still extant in the State Paper Office, that such was not the case; though it must be admitted that the account of that contest given in Strype's Memorials, leaves the matter in doubt. He says (a), "February 18, the Archbishop had a letter sent to him by the Council to proceed in the appeal between the Bishop and the Dean: for Goodman, after his deprivation, had made a formal appeal unto the king. But whether that appeal was to be allowed, since the king had left Goodman's case unto the decision of his commissioners delegate for that purpose, and they had judged and deprived him, was a case much argued by the judges. And this was the opinion of most of them, viz. where a sentence is given by commissioners delegate by the prince, the party grieved appealing, such appeal is out of the order prescribed by the said statute. And the prince in that case may grant a new commission to others to determine that appeal. And this was done. The issue was, Goodman's deprivation stood, but the bishop was constrained to sue for a pardon." This matter was also discussed in *Hutton's case* (b). There Sir Timothy Hutton presented a clerk to a living, but the bishop refused him, and thereupon he complained to the archbishop, who caused him to be instituted and inducted. The bishop, and another clerk, who was presented by the Crown, sued in the Delegates, and a prohibition was granted. "The opinion of the Court was, that, if a suit be before an arch-deacon, whereof, by the statute of 23 Hen. 8, c. 9, the ordinary may license the suit to a higher court, that the arch-

(a) Vol. 2, Bk. 1, c. 28, p. 371, ed. 1816. (b) Hob. 15.

deacon cannot, in such case, baulk his ordinary, and send the case immediately into the Arches; for he hath no power to give a Court, but to remit his own Court, and to leave it to the next; for, since his power was derived from the bishop, to whom he is subordinate, he must yield it to him of whom he received it; and it was said that so it had been ruled heretofore." To these authorities may be added the cases of *Rex v. Pigeon*, *Rex v. Elbow*, *Rex v. Turk*, and *Rex v. Weedon*, referred to by the Court of Common Pleas on refusing a rule in this case, and which are to be found in the Catalogue, by Dr. Addams, of the Processes in the Registry of the High Court of Delegates, from 1609 to 1822. The distinction is thus pointed out in Roll. Abr. tit. "Prerogative le Roy (G), Delegates," pl. 2: "But it is to be observed, that this appeal to the King in Chancery is solely by the statute aforesaid (25 Hen. 8, c. 19), upon a suit in the Court of the Archbishop, or in a peculiar exempt; for if there be a suit on a general commission of the king, there no appeal can be made to the King in Chancery within the statute 25 Hen. 8, c. 19, by the words aforesaid. And therefore there may be an appeal to the king generally, as he is supreme head of all ecclesiastical jurisdiction within the realm, and this ought to be on a bill signed by him, before the Chancellor can make out the Commission of Delegates to hear it. But on appeals on the statute 25 Hen. 8, the Chancellor can grant the commission of himself, of course, without any bill signed. 5 Edw. 6: Stephen Gardener was deprived on a commission delegate, and he appealed to the king generally, and not to him in Chancery; and on this sentence was repealed 1 Mar., as I have by report of Mr. Selden; and so it was done in the Lord Hartford's case, 1 Jac." The authorities cited in moving for this rule, as explained by the Lord Chief Justice of the Common Pleas, in delivering the judgment of the Court in *Gorham v. Bishop of Exeter* (a), are

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

all referable to the passage in 4 Inst. 341; but it is evident that Lord Coke was not of opinion, that, in all cases touching the king, the appeal must be to the Convocation; for in treating of the Prerogative Court of the Archbishop of Canterbury (a), after mentioning what is to be done when the king is made executor, he says, that from that Court the appeal is to the King in Chancery. The case of *Dyke v. Walford* (b), which is referred to by Lord Campbell, C. J., in delivering the judgment of the Court in *Gorham v. Bishop of Exeter* (c), is also an authority in point (d). [*Pollock*, C. B.—*Whiston's case* (e) shews that no meeting of the Convocation, as a Judicial Court, took place after the passing of the 25 Hen. 8, c. 19, up to the year 1711. By that case, the archbishop and bishops of the province of Canterbury, in Convocation assembled, petitioned the Crown, stating that Whiston had asserted certain heretical doctrines, and that the Convocation was desirous of calling him before them, in order either to his amendment, or expulsion from the Church of England; but being doubtful whether they had jurisdiction since the 25 Hen. 8, c. 19, they prayed the queen to lay the matter before the judges, to whom, with the Attorney-general and Solicitor-general, it was accordingly referred; and eight of the twelve, with the Attorney-general and Solicitor-general, concurred in opinion that the Convocation had a jurisdiction in cases of

(a) 4 Inst. 334.

(b) 5 Moo. P. C. Cas. 434.

(c) 15 Q. B. 52.

(d) In 15 Jur. 889, *Martin* is reported to have said, that the appeal in *Dyke v. Walford* was brought by consent. The Reporters, however, learn from the Attorney-General for the Duchy of Lancaster, that it had been agreed between the Attorney-General for the Crown (Sir F. Pollock) and himself, that on the first occasion of the question between

the Crown and Duchy arising, the appeal should be taken up to the tribunal of the last resort, and that it had been taken for granted, on both sides, that this would be the Judicial Committee. When the case occurred, Sir John Jervis was Attorney-General; and the appeal went, as a matter of course, to the Judicial Committee without any discussion as to the jurisdiction, which was taken for granted.

(e) 15 How. St. Tr. 705.

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

heresy, and four of the judges came to a different conclusion. *Alderson, B.*—That case is also mentioned in *Burnet's "History of his Own Time,"* vol. ii. p. 57, and in *Lathbury's "History of the Convocation,"* p. 338.] In the reign of William 3, the king assembled the Convocation, and endeavoured, by their means, to heal the dissensions of the Church: *Somers' Tracts*, vol. ix. p. 587. This gave rise to much discussion, and there is a letter of Sir B. Shower's on the subject still extant: *Somers' Tracts*, vol. ix. p. 411; but there is no suggestion in it of any appellate jurisdiction, though evidently written by a keen partisan.

[They then argued, that a case of duplex querela before the archbishop was not a "cause, matter, or contention, touching the king," within the meaning of the 9th section of the 24 Hen. 8, c. 12, which had reference to the three classes of causes mentioned in the earlier part of the statute, viz. "causes testamentary," "causes of matrimony and divorces," and "rights of tithes, oblations and obventions." They cited Oughton's *Ordo Judic.* tit. 159, p. 239; 2 Inst. 631, 632; *Rex v. The Bishop of Hereford* (a), *Elvis v. The Archbishop of York* (b).]

A further question arises, whether this Court has a jurisdiction in prohibition. In *Ex parte Smith*, 2 C. M. & R. 748, the Court expressed an opinion that they had such jurisdiction, but it became unnecessary to decide the point. The writ of prohibition is a prerogative writ, issuing properly out of the Queen's Bench. It is indeed stated in *Comyns' Dig.* "Prohibition," (B.), and *Blackstone's Com.* vol. 3, p. 112, that the Court of Exchequer may grant a prohibition; but the authority referred to for that position is the case of *Llen v. Seymore* (c), and there the party obtaining the prohibition was a farmer or accountant to the Crown. In *Tidd's Practice*, vol. 1, p. 38, it is said that the Court of Common Pleas, as well as the Queen's Bench, has jurisdiction in prohibition, but the Court of Exchequer is not mentioned as having it.

(a) *Comyns*, 358(b) *Hob.* 320.(c) *Palmer*, 525.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

Sir *F. Kelly, Martin, Peacock, and Badeley*, in support of the rule.—It is not necessary either to admit or disclaim a wish to revive the Convocation, for this is a pure question of law, to be determined solely on legal principles. The distinction, however, should be borne in mind, between the Convocation as a *legislative* and as a *judicial* body; and also between the meetings of the Convocation generally, and those of the Upper House only, which is now composed of the archbishops and bishops of the realm. Formerly, the sole taxation of the clergy belonged to the Convocation, so that there was as much reason for their assembling as for Parliament meeting. No general assembly of the Convocation can take place without the Queen's writ; and although the Convocation has now fallen into disuse, yet the Upper House meet annually, as a matter of form, and then adjourn. The practice by which the superior Courts are governed in applications of this nature, is thus stated by Lord *Mansfield*, C. J., in the case of *St. John's College v. Todington* (a): "If the party who applies for a prohibition has a right to declare, though the Court should see no ground for the motion, a rule to shew cause why the prohibition should not be granted, is to no purpose; and hearing counsel upon the sufficiency of that cause is time mis-spent. When the matter seems *doubtful* to the Court upon a question of fact or law, the plaintiff has leave to declare, that the parties may have the fact properly tried by a jury, or the law solemnly considered as in a cause. When the Court is clearly of opinion that there is sufficient ground for the prohibition, the defendant has a right to put the plaintiff to declare, that his jurisdiction be not taken from him in a summary way, where no writ of error will lie. But if the Court be clearly of opinion that there is no ground for a prohibition, it ought to be denied, without putting the defendant to expense, and delaying, in the mean time, the exercise of what appears to them a lawful jurisdiction. This denial is not conclusive on the plain-

(a) 1 Burr. 198.

tiff. If there is no jurisdiction, the sentence will be a nullity, and upon any attempt to execute or enforce it, the whole may be tried in an action." It has been suggested, that this Court has no jurisdiction in prohibition, but there are several instances in which it has been exercised: *Roberts v. Humby* (a), *Grimbley v. Aykroyd* (b), *In re Bartlett* (c). [*Pollock*, C. B.—There is no doubt about our jurisdiction to grant a writ of prohibition.]

Then as to the question whether the 9th section of the 24 Hen. 8, c. 12, is incorporated with the 25 Hen. 8, c. 19, or virtually repealed by it. It is first necessary to consider the language of the statutes independently of authority. One well-known rule is, that statutes are to be construed according to their ordinary grammatical sense, unless such a construction would lead to some absurdity or inconvenience: *Becke v. Smith* (d), *Vin. Abr. Statutes* (E 6). Another rule is, that the king shall not be restrained of his liberties or rights by general words in an Act of Parliament: *Dwarris on Statutes*, Vol. 2, p. 668; *Attorney-General v. Donaldson* (e); *Vin. Abr., Statutes* (E. 10). The collocation of the provisions of these statutes cannot affect their construction, for statutes are to be read as if written in one continuous paragraph. No difference of opinion exists as to the 5th, 6th, and 7th sections of the 24th Hen. 8, c. 12. The 8th is also free from doubt. Those sections relate to the three classes of cases where subjects alone are interested; the 9th section provides for the same causes touching the king, and then the appeal is to be from any of the Courts aforesaid to the Upper House of Convocation. Such being the state of the law, the 25 Hen. 8, c. 19, passed; the 3rd section of which enacts, "That all manner of appeals, of what nature or condition soever they be of, or what cause or matter soever they concern, shall be made and had by the parties aggrieved, &c. after such manner, form, and condition"

1850.
In re
GOSMAN
v.
BISHOP OF
EXETER.

(a) 3 M. & W. 120.

(b) 1 Exch. 479.

(c) 3 Exch. 28.

(d) 2 M. & W. 195.

(e) 10 M. & W. 117.

1850.

In re
GORHAM
 v.
BISHOP OF
EXETER.

as is limited for appeals in causes of matrimony, tithes, oblations, and obventions by the 24 Hen. 8, c. 12. The legislature in effect says, whereas, in those three classes of cases, where the subject is concerned, there is an appeal from the archdeacon to the bishop, and from the bishop to the archbishop; but in matters touching the king the appeal is to the Upper House of Convocation; henceforth the same modes of appeal shall be extended to all cases. The words "manner, form, and condition," might refer only to the form of procedure; but it is conceded on all hands, that they cannot have that signification here; and their meaning is, "from the same Court to the same Court, and with the same limit as to time as now prevails in causes matrimonial, tithes, and oblations, under the 24 Hen. 8." The Court of Common Pleas considered, that, as the 8th and 9th sections of that Act were preceded by express and distinct words of enactment, the "manner and form" mentioned in the 25 Hen. 8 would not have reference to the appeal given in suits which touched the king; but the words "manner and form" govern the 8th and 9th, as well as the 5th, 6th, and 7th clauses. If a statute had passed declaring that all tithe causes should be tried in the Court of Queen's Bench, provided that any such as concerned the queen should be tried in the Court of Exchequer, and then followed a clause that all causes testamentary should be tried in "manner, form, and condition aforesaid," the only construction which could be put on such an enactment is, that causes testamentary which concerned the queen should be tried in the Court of Exchequer, and those which concerned the subject in the Court of Queen's Bench. The 3rd section of the 25 Hen. 8, c. 19, does not repeal the 9th section of the 24 Hen. 8, c. 12: *Bac. Abr.* "Ecclesiastical Courts" (B), *Woodd. Lect.* vol. i. p. 176; but extends to all spiritual causes the provisions which were previously confined to certain specified causes. Then, if the 9th section of the 24 Hen. 8, c. 12, is not repealed by the 3rd section of the 25 Hen. 8, c. 19, neither is it re-

pealed by the 4th section; for by the 9th section of the 24 Hen. 8 an appeal is given to the Upper House of Convocation from *any* of the Courts aforesaid; whereas the 4th section of the 25 Hen. 8 gives an appeal to the Delegates from the Archbishop's Court only; and, consequently, if it be construed as repealing the previous enactment, it provides no remedy by appeal from the other Courts in matters touching the king. It is clear, that, in all cases within the 4th section of the 25 Hen. 8, there can be no appeal from the Delegates to the Convocation. The 24 Hen. 8 gives an appeal, in certain cases, to the Upper House of Convocation. The 25 Hen. 8 extends that provision to *all* cases. How can that be construed as giving an appeal from the Delegates to the Convocation? In the comment on this statute in Burn's Eccl. Law, vol. i. p. 62, it is said, "In the case of *Saul v. Wilson*, M. 1689, by the Lords Commissioners: There lies no appeal from a sentence in a Court of Delegates; for they cannot have any original jurisdiction, because it is a matter grounded upon an Act of Parliament, and the Act gives them none." [*Pollock*, C. B. —Lord Coke's reading on the statute is this (a): "Where the matter toucheth the king, the appeal within fifteen days to be made to the higher Convocation House of that province, and no further, but finally to be there determined. . . . Item, a general clause, that all manner of appeals, what matter soever they concern, shall be made in such manner, form, and condition, within the realm, as it is above ordered by 24 Hen. 8, in the three causes aforesaid; and one further degree in appeals for all manner of causes is given, viz. from the Archbishop's Court to the King in his Chancery, where a commission shall be awarded for the determination of the said appeal, and from thence no further."] It is argued that, possibly, the legislature may have intended to give concurrent appeals; but such a con-

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

(a) 4 Inst. 340.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

struction would be at variance with the language of the 9th section of the 24 Hen. 8, which declares that the judgment of the Convocation shall be final; and, in addition, it might give rise to conflicting decisions on the same subject-matter. Suppose, for instance, the next of kin contest a will propounded by the executor, the king having an interest in the codicil, and the Prerogative Court pronounce in favour of both will and codicil; then the next of kin appeal to the Delegates, who reverse the decree both as to the will and codicil, while the executor, dissatisfied so far as relates to the codicil, appeals to the Convocation, which confirms both. [The Court intimated an opinion that it was unnecessary to argue that point.] The 6th section of the 25 Hen. 8, c. 19, which relates to exempt jurisdictions, may be thus explained. They were entirely omitted in the 24 Hen. 8, c. 12, and the 25 Hen. 8, c. 19, passed in a hurry. Burnet, in his "History of the Reformation," says (a): "On the 27th of March it was sent up to the Lords; and since the spiritual Lords had already consented to it, there was no reason to apprehend any opposition from the temporal Lords. The session was now near an end, so that they made haste and read it twice that day, and the third time the next day, and passed it." Or probably the 6th section may have been inserted, in consequence of the peculiars being tenacious of their exemption from episcopal jurisdiction. The 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, having been repealed in the reign of Queen Mary, are both revived in terms by the 1 Eliz. c. 1, s. 10. [*Rolfe, B.*—That must be taken with this restriction, that the law, as settled by those two Acts, and so far as they are not inconsistent with each other, shall be the law again.] In Cardwell's Synodalia, p. 76, some of the judges, in 1711, in answer to a question put by the queen, say, "After conference with the rest of the judges, we are humbly of opinion, that, of com-

(a) Bk. 2, p. 147, ed. 1679.

mon right, there lies an appeal from all Ecclesiastical Courts of England to your Majesty, in virtue of your supremacy in ecclesiastical affairs, whether the same be given by the express words of any Act of Parliament or not; and that no Act of Parliament has taken the same away, and, consequently, that a prosecution of Convocation, not excluding an appeal to your Majesty, is not inconsistent with the statute 1 Eliz. c. 1, but reserves the supremacy entire." It is upon this principle that the Crown has power to issue a commission of review, notwithstanding the 25 Hen. 8, c. 19, has declared that the decision of the Delegates shall be final. The objection, that if an appeal lay to the Convocation in matters touching the Crown, it might obstruct the course of justice by refusing the writ, would equally apply to the House of Lords, whose appellate jurisdiction has been exercised from the most ancient times of which there are any memorials of record: Hale's Jurisd. H. L. 132.

The 25 Hen. 8, c. 19, passed early in the year 1534; at which time Archbishop Cranmer had pronounced the marriage of Queen Katherine void. Under the 24 Hen. 8, c. 12, the only mode of appeal to which the queen could have recourse was to the Upper House of Convocation. But when the 25 Hen. 8, c. 19, passed, the fifteen days limited for appealing, by the 9th section of the 24 Hen. 8, c. 12, had expired, so that the sentence became final. Could it then have been intended to repeal the enactment prescribing a limited time within which to appeal to the Convocation, and give an appeal to the Delegates without any limit whatever? [*Alderson*, B.—We do not construe Acts of Parliament by reference to history. In deciding *Ryder v. Mills* (a) on the Factory Act, we did not act upon what we knew had taken place in Parliament. Besides, by the 25 Hen. 8, c. 22, which became law on the same day as the 25 Hen. 8, c. 19, the king's divorce from Queen Katherine was con-

1850
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

(a) 3 Exch. 853.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

firmed by Parliament.] It is incorrect to say that there are no precedents of an appeal to the Convocation. The question of the marriage of Henry 8 with Anne of Cleves was brought before them: 1 Strype, *Eccle. Mem.* 573. *Latimer's case*, which is another instance, is thus related in Collier's "*Ecclesiastical History of Great Britain*," p. 75: "About this time, Hugh Latimer's case was brought before the Upper House of Convocation. This Latimer had been dilated in the Synod last year (1532), for maintaining erroneous doctrines, in some letters written to one Greenwood, of Cambridge; and being required to take an oath to make a true answer to interrogatories, he declined the jurisdiction of the house, and appealed to the king; but the king refusing the application, returned him to the Convocation, upon which he acknowledged himself mistaken, and was pardoned on his submission."

With respect to the Irish statutes, 28 Hen. 8, c. 6, and 28 Geo. 3, c. 32, no question of appeal has arisen upon them, and they contain no provisions expressly relating to matters in which the king is concerned. Besides, the Irish hierarchy and ecclesiastical law differ in many particulars from the English, as pointed out in Gilbert's *Exch.*, ch. 4 (a). The passage cited from Nathaniel Bacon's work is of little authority, it being the mere opinion of a layman on the construction of an Act of Parliament; and Lord Chatham, who was not a lawyer, viewed it merely as a political work. It was always considered a strong party work; and, in Clarke's "*Bibliotheca*," it is stated that the author was prosecuted. Bishop Nicolson, in his "*English Historical Library*," p. 184, says, "The great respect which has of late been paid to Nathaniel Bacon's '*Historical Discourse of the Uniformity of the Government of England*' will oblige us to consider that author apart from the rest. There are several witty political and moral reflections in his book, which dis-

(a) Bk. 2, p. 142.

cover a peculiar art in drawing very notable and weighty conclusions from weak and airy premises. His remarks on the clergy, upon all occasions, are so full of bitterness and invective, as might have become Mr. Selden himself, and are an evident argument of the author's having a mind to ape even the very passions of that angry great man . . . His main delight was, to blacken all our kings, and to shew that they had nothing lovely in them but what was derived from the favour and caresses of the people." The partisan character of the work also appears from the following passage, p. 133: "The Convocation of the clergy, like some froward children, loves not new dressing, though it be a gainer thereby. Before the Pope and Henry 8 were fallen asunder, their masters, their minds, their work, all was double; their counsels uncertain; their conclusions slow in production, and slight in their fruit and consequences; sometimes displeasing to the Pope, sometimes to the king, generally to themselves; who, naturally lingering after their own interests, were compelled to feed the body that breathed in them, rather than that wherein themselves breathed; and so, like hunted squirrels from bough to bough, were ever well tired, yet hardly escaped with their own skins in the conclusion." It is said that nothing is found in the books of practice respecting an appeal to the Convocation; but that is merely a negative sort of evidence. The books of practice of half a century ago will probably afford little information on the subject of wager of battle, though it was not abolished until after the case of *Ashford v. Thornton* (a). Until the year 1677, there is no trace of any record of an appeal under the 25 Hen. 8, c. 19, in a case in which the king was concerned; nor again from 1677 until 1796; nor from that time until the case of *Dyke v. Walford* (b). The case of *The Bishop of St. David's v. Lucy* (c)

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

(a) 1 B. & Ald. 405.

(b) 5 Moo. P. C. 434.

(c) 1 Ld. Raym. 539.

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

has no application here, for the bishop did not appeal under these statutes, but claimed his privilege as a peer of Parliament. In *Whiston's case* (a), the only question was, whether the Convocation had an original jurisdiction in cases of heresy; and it appears from the statement of Burnet (b), that eight of the judges, with the Attorney-General and Solicitor-General, were of opinion that they had such jurisdiction. In *Hutton's case* (c), the king's right was not in question; for he was not the patron of the living, and the parties were properly left to their legal remedy. *Goodman's case* (d) was not a proceeding under the statutes of Hen. 8, but under the prerogative of the Crown as supreme head of the Church. In the case of *The Dean and Chapter of Fearnese* (e), it is said, "The visitation of all donatives of the king belongs properly to the Lord Chancellor of the realm: N. Br. 42 a; or the king may make special commissioners for this purpose: 6 Hen. 4, c. 14, and *Goodman's case*, 10 Eliz. Dier, 273; where the Bishop of Bath and Wells had a special commission awarded to him by the king (Edw. 6) to visit the Dean and Chapter of Wells; by force of which authority Goodman was deprived." Also in Com. Dig. "Visitor" (A 1), it is said, that "all free chapels of the king's foundation are visitable by the king and not by the ordinary: 2 Roll. So all hospitals of the king's foundation: 2 Roll. 230, l. 17; and all donatives: 2 Roll. 230, l. 20." In *Gardener's case*, also, the commission issued by virtue of the general power of visitation which the Crown possessed, under the 26 Hen. 8, c. 1, as supreme head of the Church. But, in any view, that was an illegal and tyrannical proceeding. Lord Campbell, in his "Lives of the Chancellors," vol. ii. pp. 52, 53, says of that case, "The method of proceeding against him was violent, and was hardly disguised by any colour of law or justice. . . . A

(a) 15 How. St. Tr. 705.

(b) 15 How. St. Tr. 714.

(c) Hob. 15.

(d) 3 Dy. 273, nom. *Walrond*
 v. *Pollard*.

(e) Dav. 46.

commission was issued to the metropolitan, three bishops, and six laymen, to bring him judicially to trial. Having protested against the validity of the commission, which was not founded on any statute or precedent, he defended himself with vigour." In 4 Inst. 71, Lord Coke says, "the king himself cannot be judge in propria causâ;" and in *Day v. Savage* (a), *Hobart*, C. J., says, "that even an Act of Parliament made against natural equity, as to make a man a judge in his own case, is void in itself, for *jura naturæ sunt immutabilia*, and they are *leges legum*." These principles would be violated if an appeal lay to the Delegates in matters touching the Crown, under the 25 Hen. 8, c. 19, and à fortiori to the Judicial Committee of the Privy Council, under the 2 & 3 Will. 4, c. 92, and 3 & 4 Will. 4, c. 41, whose decision does not bind the Crown.

[They then argued, that a proceeding by duplex querela was "a cause, matter, or contention touching the king" within the meaning of the 24 Hen. 8, c. 12, s. 9. The following authorities were cited:—*Specot's case* (b), 1 Stark. Ev. pt. 2, sect. 77; *Articuli Cleri*, 9 Edw. 1, c. 13; 2 Inst. 632; *Bunting v. Lepingwell* (c); *Kenn's case* (d); *Phillips v. Crawley* (e); *Sherwood v. Ray* (f); 2 Smith's Lead. Cas. 237, 239; *The Attorney-General v. Hallett* (g); *Roscoe on Real Actions*, 103; *Com. Dig.* "Trial by Certificate" (A. 1); *Phillips v. Bury* (h); 2 Inst. 423; *Sir E. Coke's case* (i); *Willison v. Lord Barkley* (j); *Lord Sheffield's case* (k); *Hammond's case* (l); *Lamb v. Genman* (m); *Slade's case* (n); *Lord Cromwell's case* (o); *The Deanery of St.*

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

(a) Hob. 87.

(b) 5 Rep. 57.

(c) 4 Rep. 29.

(d) 7 Rep. 42 b.

(e) Freem. 83—Q. B.

(f) 1 Moo. P. C. 353.

(g) 15 M. & W. 97.

(h) Skinn. 447, 512; 2 T. R. 346.

(i) Godb. 291.

(j) Plowd. 239; Godb. 308.

(k) 2 Roll. 317.

(l) Hard. 176.

(m) Parker, 143.

(n) 4 Rep. 95 b.

(o) 4 Rep. 13 a.

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

Buryan, 1 Rolls of Parliament, 421, 462; Oliver's *Monasticon* Diocesis Exoniensis; Bracton lib. 5, f. 403, B; *The Bishop of Exeter v. Hele*(a); Taylor's Evid. s. 1209; Phillippe' Ev. 543, 550; Hargrave's Law Tracts, 452, 457, 458, 464.]

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was a rule nisi, granted at the instance of the Lord Bishop of Exeter, to prohibit the Right Honourable Sir Herbert Jenner Fust, &c. (his Lordship read the rule).—The facts necessary to be stated for a due understanding of this case are as follows:—In the year 1847 Mr. Gorham was presented by her Majesty to the living of Brampford Speke, in the diocese of Exeter. The bishop refused to admit Mr. Gorham on the ground that he entertained opinions not in accordance with the doctrines of the Church of England. Upon this refusal, Mr. Gorham instituted a proceeding by duplex querela against the bishop in the Court of the Archbishop of Canterbury, complaining of the decision of the bishop, and alleging that he entertained no doctrines inconsistent with those of the Church. The case was heard before Sir Herbert Jenner Fust, Dean of the Arches, who dismissed the complaint and confirmed the decision of the bishop. Mr. Gorham then appealed from the judgment of Sir Herbert Jenner Fust to her Majesty in Council; and the case was by her Majesty referred to the Judicial Committee of the Privy Council, by whom it was heard at great length in the month of February last; and in the month of March, the Judicial Committee reported in favour of the appeal, and made a recommendation to her Majesty accordingly; upon which her Majesty, on the 9th of March, issued an Order in Council to carry into effect the report and recommendation of the Judicial Committee.

(a) Show. P. Ca. 88.

The appeal to her Majesty in Council was grounded on the statute 2 & 3 Will. 4, c. 92, which abolished the Court of Delegates created by 25 Hen. 8, c. 19, s. 4, and enacted that all appeals which might have been made to that Court should thenceforth be made to the King in Council; and by the subsequent Act of 3 & 4 Will. 4, c. 41, s. 3, all such appeals are to be heard by the Judicial Committee.

At the beginning of last Easter Term, the Bishop of Exeter applied to the Court of Queen's Bench for a prohibition to prevent any further proceedings on the Order in Council, made pursuant to the judgment of the Judicial Committee, on the ground that the matter in controversy was one which touched the Queen as patron of the living, and that, in a case touching the Queen, there never was an appeal to the Delegates, and so neither would there now be an appeal to her Majesty in Council. The Court of Queen's Bench, after taking some time to consider, unanimously refused to grant a rule. The bishop then, later in the same Term, made a similar application to the Court of Common Pleas, and that Court, in the following Term, by an unanimous decision, also refused to grant the rule applied for. The judgments of both those Courts proceeded on the ground, that even supposing the matter to be one which touched the Queen, still there was an appeal to her Majesty in Council under the statute 25 Hen. 8, c. 19, altered by the subsequent statutes of the 2 & 3 Will. 4, c. 92; the order, therefore, which had been made was legal and valid; and so the bishop was not entitled to a prohibition.

Late in the last Term, the bishop renewed his application for a prohibition by applying to this Court; and under the circumstances of the case, the motion before us being made at a time when it was impossible for us satisfactorily to look into the authorities during the Term, we thought it best to grant a rule nisi, in order that the matter might be discussed and disposed of at the present sittings, instead of being left to stand over till Michaelmas Term, as it pos-

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

sibly might have done if we had taken time till after the last Term to consider whether we ought or ought not to grant a rule nisi. The rule having been thus granted, cause was shewn against it on the 29th.

The question now is, whether the rule is to be made absolute or to be discharged. This involves two points: first, whether this is a case which touches the Crown, for if it do not touch the Crown, it is admitted the appeal to the Queen in Council is well founded: secondly, whether in all cases, (touching or not touching the Crown), there is an appeal from the Archbishop's Court to the Queen in Council; if there be, then also the appeal to her Majesty in Council is authorised by law, and this rule cannot be made absolute. In the Courts of Queen's Bench and Common Pleas the judgment was founded entirely on the second point; we directed the attention of counsel to the first point also, entertaining as we then did, and still do, considerable doubt whether the matter touches the Crown or not. But we have thought it unnecessary to decide this point, as we are all clearly of opinion, that, whether a case of duplex querela before the archbishop be one which touches the Crown or not, there was an appeal given by the 25 Hen. 8, c. 19, to the King in Chancery, and therefore now there is an appeal to the Queen in Council. We have arrived at this conclusion by considering what is the combined effect of the two statutes, 24 Hen. 8, c. 12, and 25 Hen. 8, c. 19, by which last statute the authority of the Court of Delegates in these matters was first created; for the Judicial Committee, without any doubt, have been substituted for the Court of Delegates, and have (at the least) the same jurisdiction.

We will therefore begin with the 24 Hen. 8, c. 12. By that Act, restraining appeals to Rome in suits testamentary, matrimonial, and for tithes, there is, first, a general prohibition to all persons, subjects of this realm or resiants, to appeal to Rome under penalty of a præmunire; and then a provision by the 5th section, that where the king's subjects

or resiants within the king's dominions had before used to appeal to Rome, concerning the three causes before mentioned, they (i. e. the king's subjects or resiants) should appeal within the realm of England, and not elsewhere, in the manner and form thereafter pointed out, and not otherwise.

The Act then proceeds to describe four classes of cases:—

First, causes coming before the bishops' archdeacons, which are to be pursued through the Bishop's Court, and so to the Archbishop's Court, there to be definitively and finally ordered, decreed, and adjudged, without any appellation or provocation to any other person or persons, court or courts. Secondly, causes commenced before the bishops, which go to the Archbishop's Court, in precisely the same terms as to finality. Thirdly, suits commenced before the archdeacon of the archbishop, which, after going first through the Court of Arches, are to go before the Archbishop himself, (obviously referring to the court, now obsolete and absorbed in the Court of Arches, formerly held before the archbishop in person, assisted as he generally was by assessors). But this class of cases also, when arrived at this point, was to be definitively and finally determined, without any other or further process or appeal to be thereupon had or sued. The fourth class of cases was those of suits commencing (as this present case did) before the archbishop himself—which were to be definitively determined by him, without any other appeal, provocation, or any other foreign process out of this realm, to be used to the let or derogation of the said judgment, sentence, or decree, otherwise than by this Act was limited and appointed.

This then was the state of the law:—by express words, the decision of all these appeals by subjects or resiants grieved might be commenced in various Courts; but in all of them the decision of the Court of the Archbishop was to be final, otherwise than was by that Act limited and appointed. And the words were *general*, and *clearly extended* (if the Act had,

1850.
In re
GOSHAM
v.
BISHOP OF
EXETER.

1850.
 In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

but for the proviso, stopped here) to all suits, whether such as touched the king or such as did not. But then came the 9th section as a sort of proviso or qualification of them all. That clause enacted, that in suits touching the king, ventilate, commenced, or begun in any of the said Courts (i. e. bishops' or archbishops' archdeacons, or bishops' or archbishops' Courts), the final appeal should be to the "spiritual prelates, abbots, and priors of the Upper House of Convocation of the respective provinces where the suit began; and that what matter there should be determined, appertaining, concerning, or belonging to the king, his heirs or successors, should stand and be taken for a final decree, and the same matter never after to come in question and debate, to be examined in any other Court." The true meaning of this is clearly, we think, to repeal the finality as to decisions in the Archbishops' Courts in cases which touched the king, leaving it in all other cases. Then came the 25 Hen. 8, c. 19, by which that which had been before confined to three classes of ecclesiastical cases, was extended to all. This was done, we think, by the conjoint operation of the two sections, the 3rd and 4th; which, it may be well to observe, form in the old black-letter editions of the statute only one paragraph. It would clearly be incorrect to say that the words of the 3rd section, in their strict literal meaning, can be construed so as to give effect to the obvious intention of the legislature, for this would be to make the legislature enact, first, that all these cases should be *finally* determined without any appeal from the Archbishop's Court; and then, by the 4th section, alter that provision by giving a further appeal to the Court of Delegates. It is, we think, clearly more simple and more reasonable to say, that the two sections, taken together, mean that the provisions as to the form and manner of appeals, given in the 24 Hen. 8, c. 12, and amended by the 4th section of the 25 Hen. 8, c. 19, shall extend to the three classes in the 24 Hen. 8, c. 12, and all other *ecclesiastical* appeals whatsoever. And

if we do this, the natural mode of placing the sections in order, will be to superadd to the appeal to the Archbishop's Court a new Court of appeal, thereby repealing the finality of that Court, and substituting in its place the finality of the new Court, (viz. the Court of Delegates,) and the declaration that there shall be no further appeal from them. Now, had the 24 Hen. 8, c. 12, been so framed, it is clear that the Court of Delegates would have been the ultimate Court of Appeal provided by the 6th, 7th, and 8th sections of that Act. The words of the three sections were general, and applicable both to causes touching and not touching the king; the words of the section as to the Court of Delegates are general also. The Archbishop's Court was by these sections made final; the Court of Delegates is in like manner made final. The proviso in the 9th section altered the finality as to the Archbishop's Courts, but confined that finality to matters not touching the king. It is obvious that a similar effect may well be given to the words which render final the decisions of the Court of Delegates. Indeed, it was admitted at the bar, and could not be denied, that this order of the sections rendered the case free from all doubt, and that the conclusion (if such were the order) would clearly be, that in cases touching the king, the appeal would be from the Archbishop's Court to the Court of Delegates. And, after considering the whole question, we are of opinion that, according to the true construction of the two statutes, there was an appeal, in all cases, (whether they touched the king or not), from the Archbishop's Court to the King in Chancery, and, therefore, that there now is an appeal to the Queen in Council.

This also appears to be the result of the most eminent of the authorities cited. In the 4 Inst. 337, Lord Coke says, (of the Court of Arches), "From this Court, the appeal is to the King in Chancery, by the said Act of 25 Hen. 8, c. 19;" (making no mention of any exception in a case touching the Crown). Again, in that part which treats of the Court of

1850.
In re
GORHAM
v.
BISHOP OF
EXETER.

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

Delegates, (p. 339), he says, "These delegates do sit by force of the king's commission in three causes: first, when a sentence is given in *any* ecclesiastical cause by the archbishop or his official," (again making no mention of any exception). And lastly, in treating of appeals (p. 340), he says, (quoting and adopting Lord Dyer's words), "Item, a general clause that all manner of appeals, (*what matter soever they concern,*) shall be made in such manner, form, and condition," within the realm, as it is above ordered by the 24 Hen. 8, in the three causes aforesaid; and one further degree in appeals for all manner of causes is given, viz. from the Archbishop's Court to the King in his Chancery." So Com. Dig. tit. "Prærogative," D. 14, after setting out the section of the 25 Hen. 8, c. 19, proceeds thus, "*And therefore in all ecclesiastical causes an appeal lies to the Delegates.*" Blackstone(a) alone of all the authorities, says, "The appeal" (where the king himself is a party) "*does not lie to the King in Chancery,* which would be absurd; but, by the stat. 24 Hen. 8, c. 12, to all the bishops of the realm assembled in the Upper House of Convocation." The inaccurate manner in which the statute is quoted, affords strong ground for doubting the conclusion of the writer, and we think the authority of Lord Coke and of Chief Baron Comyns is not outweighed by this reference to Blackstone. Indeed, if the passage be taken to the letter, it confines the appeal to the Convocation to those cases in which *the king himself is a party*; and it is quite clear that her Majesty is not a party to these proceedings, and so it would be no authority in this case at all.

The Courts of Queen's Bench and Common Pleas came to the conclusion that the appeal to the Convocation was altogether abolished by the effect of the second statute. They both thought, that when by the express provision of

(a) 3 Com..67.

the 4th section in the 25 Hen. 8, c. 19, a new appeal was given to all parties grieved without any exception, and a new tribunal was constituted for the purpose, and no further appeal was to be had or made from the same, this was in effect a repeal of the exceptional right of appeal given by the 24 Hen. 8 in the particular cases of matters touching the Crown. And in support of this view of the case reliance was placed on the fact, that no appeal to Convocation ever has taken place during the three centuries and upwards which have elapsed since the passing of these statutes; and, on the other hand, it was shewn, that in several cases since the reign of Henry 8, (certainly in five, perhaps in more) in which the king was concerned, an appeal has been made to the Delegates, without objection.

The conclusion at which the Courts of Queen's Bench and Common Pleas have arrived seems to us so reasonable a construction of the statutes, explained as they are by subsequent usage and contradicted by no contrary practice, that but for the authority of Lord Coke, followed by a great number of other text-writers of eminence, we should at once have adopted it. We feel, however, that the authority of Lord Coke is not to be lightly disregarded; and certainly in the 4th Institute he speaks of the Court of Convocation as a court to which there was an appeal under the statutes in question in cases touching the king. This is expressly stated under the head of "Court of Convocation," in p. 323, and again under the head of "Appeals," in p. 339. It is true that in the latter passage Lord Coke is not speaking from his own mind, but is only giving the report of Lord Dyer; but we think it must be inferred, that he meant to adopt as good law what he so states himself to have received from Lord Dyer. What Lord Coke thus states, namely, that in matters which touch the King there is an appeal to the Upper House of Convocation, has been adopted by a great number of writers of the highest eminence, including Lord Chief Baron Comyns, Ayliffe in

1850.
In re
 GORHAM
v.
 BISHOP OF
 EXETER.

1850.
 {
In re
 GORHAM
 v.
 BISHOP OF
 EXETER.

his "Parergon," and others. These subsequent authorities, it was said, do not add anything to the weight of the original authority of Lord Coke, from whom they obviously took their law; nor do they, save only that their adoption of what had been laid down by Lord Coke proves that they did not doubt its accuracy. It was indeed a matter of little or no practical importance, and in all probability they adopted Lord Coke's authority without much or perhaps any investigation. Still the result of the whole is, that Lord Coke, writing long after the reign of Henry 8, says there is in matters touching the king an appeal to the Convocation, and many subsequent text-writers of great eminence down to very modern times assert the same. In the present case this is rather matter of curious speculation than of any practical importance, for in either view of the case, the proceedings before the Judicial Committee were well founded, and in either view of the case there can now be no further appeal. If the second statute, 25 Hen. 8, c. 19, repealed the 9th section of the former statute, the proceedings questioned by the present application are perfectly regular. So, if the second statute merely gave a further appeal in all cases to the Delegates, equally the proceedings before the Judicial Committee now questioned are regular, and there can now be no further appeal of any sort, as the 3rd section of the 2 & 3 Will. 4, c. 92, *expressly* makes the judgment, order, or decree under that statute, *final and definitive*.

If we were compelled to decide this question, we should probably come to the same conclusion as the other Courts of Westminster Hall, viz. that, in effect, the stat. 25 Hen. 8, c. 19, did repeal the clause in the 24 Hen. 8, c. 12, s. 9, which, in causes touching the Crown, gave an appeal to the Convocation. There is on the one hand what appears to us to be a reasonable construction of the statute, supported by all the practice that is known to exist on the subject, and opposed by none. On the other hand, there is the au-

thority of Lord Coke and the text-writers, that some appeal did exist to the prelates of the Upper House, in causes touching the King. But as we have observed; this is now practically of no importance. The question before us is not whether there was, after the passing of the 25 Hen. 8, c. 19, some appeal to the Convocation, in some stage of causes touching the king, but whether in all manner of (ecclesiastical) causes, there was an appeal from the Archbishop's Court to the King in Chancery; and we think there was, and that, therefore, there now is to the *Queen in Council*. Our judgment is founded on what we hold to be the true construction of the Act, and on the eminent authorities already referred to, which it has been incorrectly stated lead to a contrary conclusion.

The view we have taken may be fortified by some matters presented to us in the course of the argument. The section of the 25 Hen. 8, c. 19, which gives the appeal to the Delegates, expressly says, "A commission shall be directed *like as in case of appeal from the Admiral's Court*." Now it is well known that the appeal from the Court of Admiralty to the Delegates has always been of all manner of causes, whether touching the Crown or not. It was further noticed, that in the Irish statute 28 Hen. 8, c. 6, following the course (very generally adopted) of assimilating the law of Ireland to the law of England, the appeal to Rome is taken away, and an appeal given precisely according to the construction of the English statutes adopted by the Courts of Queen's Bench and Common Pleas. It is true, there may not have been a Convocation in Ireland similar in all respects to what existed in this country; but there certainly was a Convocation; and undoubtedly there were "spiritual prelates" to whom the appeal might have been given, if it were necessary (as it was generally thought to be) to assimilate the practice in Ireland with the practice in England, and if in fact there was an appeal in England to the spiritual prelates in the Convocation here. Lastly, we may re-

1850.

In re
GOREHAM
v.
BISHOP OF
EXETER.

1850.

In re
GORHAM
v.
BISHOP OF
EXETER.

mark that the stat. 25 Hen. 8, c. 19, by giving the appeals in all causes ecclesiastical from the archdeacon to the bishop or ordinary, and from him to the metropolitan or archbishop, and from him to the King, *and no further*, (if such was the effect of the statute), did but restore the ancient law of the land as settled, on this point, by the constitutions of Clarendon, in the reign of Hen. 2, A.D. 1164. The constitutions of Clarendon were directed against the encroachments of ecclesiastical power, and the usurpations of the papal authority; and next to the Great Charter itself, they have been always considered as a security for the independence of the kingdom, and the liberty of its subjects. These last observations would not, of themselves, be sufficient to support our decision; but they add strength and reason to the authorities we have cited, and they illustrate the construction of the statutes which we have felt ourselves bound to adopt.

On the whole, therefore, entertaining, as we do, no doubt upon the question before us, and concurring with the other Courts of Westminster Hall, and, as far as we know, with every judge of all the Courts, we do not think that we should be justified in creating the delay and expense of further proceedings with a view to take the opinion of the House of Lords; and our judgment is, that the rule be discharged with costs.

Rule discharged, with costs.

1850.

VINCENT v. THE BISHOP OF SODOR & MAN and Others.

July 8.

THIS was a special case sent for the opinion of this Court by Vice-Chancellor *Wigram*.

Prior to and in contemplation of the marriage then intended, and soon afterwards solemnized between the Rev. John Ireland, clerk, afterwards Dean of Westminster, deceased, and Susanna Short, spinster, also deceased, by indentures of lease and release and settlement, the release and settlement bearing date the 28th of January, 1794, a certain freehold estate, held for certain lives still in existence, and limited in its creation to the lessee, his executors, administrators, and assigns, was conveyed to the trustees of the said settlement, their executors, administrators, and assigns, to certain uses in favour of the said John Ireland and Susanna Short, and their issue, which have since failed, and after the determination thereof, to the uses following, that is to say, "to the use of such person or persons, in such parts, shares and proportions, manner and form, and for such ends, intents and purposes, and under and subject to such powers, provisoes, and limitations, as the said Susanna Short shall, at any time or times, during and notwithstanding her intended coverture, by any deed or deeds, writing or writings, with or without power of revocation, to be by her sealed and delivered in the presence of and attested by two or more credible witnesses, or by her last will and testament in writing, or any writing purporting to be or in the nature of her last will and testament, to be by her signed and published in the presence of and attested by the like number of witnesses, and which deed or deeds and will she

By deed, certain estates were settled to the use of such person or persons, in such parts, shares, and proportions, manner, and form, and for such ends, intents, and purposes, and under and subject to such powers, provisoes, and limitations as S. S. should, by deed, as therein mentioned, or by her last will and testament, or any writing purporting to be or in the nature of a last will and testament, to be by her signed and published in the presence of and attested by two or more credible witnesses, and which she was thereby authorised to make and execute, direct or appoint.

S. S., by her will, dated in 1826, (in which year the testatrix died), devised

the estate to certain persons, and appointed executors, and signed and sealed her said will. The attestation clause was as follows:—"Signed and sealed in the presence of H. O., of &c., and M. E., of &c."

Held, that, as *sealing* the will in the presence of two witnesses amounted to a publication of it, the attestation sufficiently expressed that the will was published, and that the publication was attested as required by the power, and, therefore, that the power was well executed.

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN.

is hereby authorised to make and execute notwithstanding her said intended coverture, direct or appoint, and in default of and subject to such direction or appointment, to the use of the said John Ireland, his executors, administrators and assigns, for their own use and benefit, and to no other use and intent or purpose whatsoever."

The said Susanna Ireland (formerly Susanna Short) made and executed her last will and testament in writing, or appointment in writing in the nature of a will, dated February 17, 1826, whereby she devised the said estate comprised in the said settlement after the death of her said husband, to certain of her relations in her said will named, and she appointed her executors, and concluded her said will, in the words and figures and form following, that is to say:—"I appoint for executors of this my will the Rev. Thomas Vowler Short, the Rev. William Short (my two nephews), and Ralph Barnes, Esq., attorney-at-law, executor.

SUSANNA IRELAND, (L. S.).

"February 17, 1826.

"Signed and sealed in the presence of Humphrey Pritchett, Apothecary, 13, Great Queen Street, Westminster, Mary Eames, housekeeper to Mrs. Ireland."

The said Susanna departed this life on the 1st of November, 1826, and in the lifetime of her said husband, without having altered or revoked her said will, which has been duly proved, pursuant to an Order of her Majesty in Council, made on the 4th of March, 1847, confirming a report of the Judicial Committee of the Privy Council in a case of appeal from a sentence of the Prerogative Court of the Archbishop of Canterbury. The said John Ireland has also departed this life. In this suit, which is depending in the Court of Chancery, between the executors of the said John Ireland and executors of the said Susanna Ireland, and other persons interested in their respective estates, it has become necessary to determine whether the said will of

the said Susanna Ireland is a valid exercise of the power of appointment of the said estate, which was so given or limited to her by the said release and settlement of the 28th of January, 1794, as aforesaid.

The case then proceeded to set out certain evidence to establish a publication of the will; but the plaintiff's counsel admitted that there had been such a publication of the will.

The question for the opinion of the Court was, whether the said Susanna Ireland's will, or appointment in the nature of a will, was a due execution of the said power of appointment so limited or given to the said Susanna Ireland by or contained in the said indenture of release of the 28th of January, 1794.

The case was argued in last Easter Term (May 3), and Trinity Term (May 29), by

1850.
VINCENT
v.
BISHOP OF
SODOR & MAN.

Makins for the plaintiff.—The plaintiff admits that there has been a publication *in fact* of Susanna Ireland's will, or appointment in the nature of a will, but contends that the instrument in question was not a due execution of the power of appointment given to her by the indenture of release and settlement of the 28th of January, 1794. By the terms of that deed, the *publication* of the will must be attested. There is an absence of such attestation here. In *Wright v. Wakeford* (a), which was sent by Lord *Eldon* (b) for the opinion of the Court of Common Pleas, it was held by the majority of the Court, dissentiente *Mansfield*, C. J., that a mere direction that a deed shall be under the hand and seal of a party, attested by witnesses, requires the attestation signed by the witnesses to express that the deed was both signed and sealed in their presence. In that case the power was required to be executed "with the consent of Thomas Wood the elder and Thomas Wood the younger, testified by any writing under their *hands* and seals, attested by two

(a) 4 Taunt. 213.

(b) 17 Ves. jun. 454.

1850.
 VINCENT
 v.
 BISHOP OF
 Sodor & Man.

or more credible witnesses." The attestation contained the words "sealed and delivered" only, and was held to be insufficient. In *Doe v. Peach* (a), the Court of King's Bench ruled in compliance with the preceding case, at the same time expressing the respect they entertained for the opinion of *Mansfield*, C. J. Lord *Ellenborough*, C. J., there said, in delivering the judgment of the Court, "It seems to us, that, to make a due execution of the power, there must be a making of an instrument with all the forms required by the power, and that there must be an attestation of its execution with all those forms." These cases were followed by *Wright v. Barlow* (b), in which the Court of King's Bench adhered to their previous decisions, and said, that they felt themselves bound by *Doe v. Peach*. These cases settled the question as to deeds. In *Moodie v. Reid* (c), a power to be executed by will or any writing or appointment in the nature of a will, to be signed and *published* in the presence of and attested by two or more credible witnesses, was held to be not well executed by a will signed by the donee, and attested thus: "Witness B. H. and J. H." The last words of the will were, "these my last bequests *signed* by me," &c., and then the word 'witness' and the names of the witnesses followed. Lord C. J. *Gibbs* held, that the witnesses had clearly attested the signing, but that there was no attestation of the publication. The learned Chief Justice there says, that he does not clearly understand what the publication of a will is; but that he supposes it to be that by which the testator designates that he means to give effect to a paper as his will; and the observations of Sir *John Leach*, in *Stanhope v. Keir* (d), are to the same effect. In *Doe v. Pierce* (e), it was held, that a power to appoint by deed or writing under the donee's hand

(a) 2 M. & Selw. 576.

(b) 3 M. & Selw. 512.

(c) 1 Mad. 516; S. C., 7 Taunt. 355.

(d) 2 Sim. & Stu. 37.

(e) 6 Taunt. 402.

and seal, and attested by two or more credible witnesses, was not properly pursued by a will, apparently under the testator's hand and seal, which seal an attesting witness believed was affixed before execution and attestation, if the attestation did not notice the sealing as well as the signing; the Court holding the case to be undistinguishable from that of *Wright v. Wakeford*. The cases of *Allen v. Bradshaw* (a), and *George v. Rielly* (b), may also be referred to as bearing upon this subject. The case of *Mackinley v. Sison* (c), will no doubt be relied upon by the defendants; there Vice-Chancellor *Shadwell* said, "The next question is as to the execution of the power. The father's will requires that the power shall be exercised by his daughter, either by a deed or instrument in writing to be by her sealed and delivered in the presence of and to be attested by two or more witnesses, or by her last will and testament in writing, or any writing purporting to be or being in the nature of her last will and testament, to be by her signed and published in the presence of and to be attested by the like number of witnesses. Now I find no legal definition or explanation of the meaning of the term 'publication;' and therefore, if it appears that a testatrix has produced her will to witnesses, and has signed and sealed it in their presence, and they have attested that she has done so, I must take it that she has published the document in their presence. I am of opinion, therefore, that the power has been duly exercised in point of form." The correctness of that decision is questionable, as several of the most important authorities upon the point were not cited. In *Waterman v. Smith* (d), it was held to make no difference that the deed was to be *executed* in the presence of and attested by the witnesses, although it was insisted that the execution was the thing to be attested;

1850.
VINCENT
v.
BISHOP OF
SODOR & MAN.

(a) 1 Curt. 110.

(b) 2 Curt. 1.

(c) 8 Sim. 561.

(d) 9 Sim. 629.

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN.

but there Vice-Chancellor *Shadwell* said, that the question was quite different from the question as to publication. In *Ward v. Swift* (a), the instrument was signed, sealed, and delivered, as and for the last will and testament of the testatrix, and was attested as such; and the Court of Exchequer held, that the power which required the publication to be attested was well executed. That case is therefore clearly distinguishable from the present. *Warren v. Postlethwaite* (b), and *Lempriere v. Valpy* (c), may be relied upon by the defendants. In *Burdett v. Spilsbury* (d), lands were limited to such uses, &c., as L. H. W. should appoint by her last will and testament in writing, to be by her signed, sealed, and published in the presence of and attested by three or more credible witnesses. L. H. W. signed and sealed an instrument, containing an appointment, which commenced thus: "I, L. H. W., do publish and declare this to be my last will and testament;" and it ended thus: "I declare this only to be my last will and testament; in witness whereof, I have to this my last will and testament set my hand and seal, the 12th of September" &c. The attestation was thus: "Witness C. B., E. B., A. B." and the House of Lords held that the power was well executed. But there the publication appeared upon the face of the instrument, and the attestation was general. In the present case, the fact of publication does not so appear, and the attestation is confined to the signing and sealing of the instrument. A seal is not the badge of a will, but of a deed. And, although the witnesses saw the testatrix sign the instrument, they might have well considered it to have been a deed *inter vivos*. In *Bartholomew v. Harris* (e), the words of the attestation clause were, "We the undersigned attest to have seen the testator sign the above will;" and the Vice-Chancellor there said, "that appears to me to be, of itself, a suf-

(a) 1 C. & M. 171.

(b) 1 Coll. C. C. 171.

(c) 5 Sim. 108.

(d) 10 C. & F. 340.

(e) 15 Sim. 78.

ficient testification by the witnesses, that they saw the testator sign what they knew to be his will; in what words it was communicated, or by what acts made known, is utterly indifferent."

1850.
VINCENT
V.
BISHOP OF
SODOR & MAN.

Humphry, for the defendant. — First, according to the language of this power, it is the instrument itself which is to be attested, and not the ceremony of publication. Secondly, publication is not of itself a specific act, but the result of a due execution of the testamentary instrument. Thirdly, even if publication be considered as a specific act, sealing is a publication within the terms of the power, and that is attested. The meaning of the word "publication," before the 1 Vict. c. 26, was settled by several authorities. *Curteis v. Kenrick* (a) decided that *delivery* was equivalent to publication. A fortiori, *sealing* would be. In *Doe d. Spilsbury v. Burdett* (b), *Coltman, J.*, observes, that in none of the cases respecting the execution of powers "have the instruments been held to be well executed unless the attestation itself, either stated in express terms, or shewed by equivalent expressions, that the requisite conditions had been complied with." And *Alderson, B.*, there says (c), that any words in the attestation, shewing the will or instrument to have been completed as an operative instrument, will satisfy the word *published*, or the word *delivered*, in a power. In *Viner's Abridg. "Devise,"* (N. 2), pl. 16, it is said, "upon a trial at bar in this Court, in an issue out of Chancery, first, it was resolved by the whole Court, that if a man draws up his own will and sends it to counsel to be advised of the legality of it, this is no will unless it has a publication after he receives it back from his counsel. Secondly, it was resolved, that, if after his will came from counsel with alterations made by counsel, the party puts his seal to it, or subscribes his name, or writes upon it 'This is my will,'

(a) 3 M. & W. 461.

(b) 9 A. & E. 942.

(c) 9 A. & E. 957.

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN.

though there be no witnesses to it, yet this is a good publication, because any of those declare his intent that that should be his will." In the same work, "Devise" (N. 7), pl. 12, reference is made to a case of *Peate v. Ougley* (a), which decided, that, since the 29 Car. 2, c. 3, s. 5, "there is no necessity that the witnesses see the testator write his name; and if he writes these words, 'signed, sealed, and published as his will,' and prays the witnesses to subscribe their names to that, it will be a sufficient publication of his will, though the witnesses do not hear him declare it to be his will." And Sir J. Hollis mentioned a case determined by Lord Chancellor *Shaftesbury* before the 29 Car. 2, where a man wrote his will with his own hand, and also these words, "signed, sealed, and published in the presence of," and no witnesses had subscribed it, it was held to be "a sufficient publication." *Wallis v. Wallis*, T. 1762, cited in 4 Burn's Eccles. Law, p. 100, 9th ed., is an authority to the same effect. In *Trunmer v. Jackson*, also cited in 4 Burn's Eccles. Law, p. 102, "the witnesses were deceived by the testator at the time of the execution, and were led to believe, from the words used by the testator at the execution of the instrument, that it was a deed and not a will. It was delivered as his act and deed; and the words "*sealed and delivered*" were put above the place where the witnesses were to subscribe their names. And it was adjudged by the Court, as it is said, for the inconveniences that might arise in families, from having it known that a person had made his will, that this was a sufficient execution." Also in *White v. Trustees of the British Museum* (b), it was held that a will of lands, subscribed by three witnesses in the presence and at the request of the testator, is sufficiently attested within the Statute of Frauds, although none of the witnesses saw the testator's signature, and only one of them knew what the paper was. *Mackinley v.*

(a) Comyns, 197.

(b) 6 Bing. 310.

Sison (a) is an express authority that sealing is equivalent to delivery, for the purpose of publication. There the testator bequeathed a certain sum in trust for his daughter for life, and after her decease in trust for such persons as she should by deed or will, *signed and published* by her in the presence of and attested by two witnesses, appoint. The daughter made a will, which was expressed to be signed and sealed only, but which was attested by three witnesses; and that was held a due execution of the power. In *Barnes v. Vincent* (b), Vice-Chancellor *Knight Bruce* asked "What is held to amount to a publication in the Ecclesiastical Courts? Is declaration of testamentary intention sufficient?" During the lifetime of the testator, publication may be said to be potential only, and it is the death which completes it. Where a widow, after the death of her husband, delivered a will made during coverture to her executor for safe custody, such delivery, coupled with other recognitions, was held to amount in a Court of probate to republication: *Miller v. Brown* (c). An award is "published" when it is executed by the arbitrator in the presence of and attested by witnesses: *Brooke v. Mitchell* (d). In like manner a will is "published" when the testator has done some act indicating that the instrument is complete. In *Roberts on Wills*, sect. 2, p. 100, it is said, "the term itself (publication) seems never to have borne any very precise or appropriate meaning, or to have indicated any certain and fixed form." Where a testatrix called the witnesses to attest her will, sealed it, and declared it to be her act; that was held a "publication" within the meaning of a power which required the will to be signed and published in the presence of witnesses: *Warren v. Postlethwaite* (e). *Sealing* for this purpose must be considered equipotent with

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN.

(a) 8 Sim. 561.

(b) 5 Moo. P. C. 205.

(c) 2 Hagg. Eccl. Rep. 209.

(d) 6 M. & W. 473.

(e) 2 Coll. C. C. 108.

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN

delivery. In Johnson's Dictionary the word "seal" is defined as "any act of confirmation." The authorities relied on by the plaintiff are distinguishable from the present case. In *Waterman v. Smith* (a) no question arose as to publication. In *Doe v. Pierce* (b) the attestation noticed the signing but omitted the sealing, which the power required to be attested. In *Moodie v. Reid* (c) the attestation did not point to the publication; and, besides, both that case and *Stanhope v. Keir* (d) may be considered as overruled by *Doe d. Spilsbury v. Burdett* (e). [He then referred to passages in the judgments of *Alderson, B.*, and *Parke, B.*, as reported in 9 A. & E. 954, 956, 957, 971, and the judgments of *Wightman, J.*, *Erskine, J.*, and *Patteson, J.*, in that case, as reported in 10 CL. & Fin. 346, 368, 371, 396.]

Malins, in reply.—The term "publication" imports that the witnesses were informed at the time of attestation that the instrument was a testamentary instrument. The law on this subject has been settled by a series of authorities, which are recognised as binding in *Doe d. Spilsbury v. Burdett* (e). The cases of *Wright v. Wakeford* (f), *Stanhope v. Keir* (d), and *Doe v. Pierce* (b) shew that not merely the instrument but also the ceremony of publication must be attested. Since the Statute of Frauds, the witnesses attest all that is necessary to give the deed validity, viz. the ceremony of its execution. So here the witnesses must attest all that is required to be done by the donee of the power. "Publication," without signing, would be of no avail, then how can signing be sufficient without publication? If this had been a deed inter vivos, and the attestation had gone to the sealing only, or to the delivery only, that would not have been a valid execution of the power: *Buller v. Burt* (g).

(a) 9 Sim. 629.

(b) 6 Taunt. 402.

(c) 1 Mad. 516.

(d) 2 S. & S. 37.

(e) 9 A. & E. 936.

(f) 4 Taunt. 213.

(g) Cited 4 A. & E. 15.

Sealing is no publication, for it does not communicate to the witnesses that the instrument is to operate after the death of the party executing it, but rather raises a presumption the other way. Besides, sealing was not required by the power, and was therefore a mere nugatory act. [He also referred to *Simeon v. Simeon* (a), *Bartholomew v. Harrison* (b).]

1850.
VINCENT
v.
BISHOP OF
SODOR & MAN.

Cur. adv. vult.

The judgment of the Court was now delivered by

ALDERSON, B.—We shall certify, in this case, to the Vice-Chancellor, that we are of opinion that the power was well executed.

By the settlement, on the marriage of the Dean of Westminster with Miss Susanna Short, a power was given to that lady, during coverture, by any deed, sealed and delivered in the presence of and attested by two or more witnesses, or by her last will signed and published in the presence of and attested by two or more witnesses, to appoint certain property therein mentioned to such uses as she might choose.

It appears that, by her will, dated the 17th February, 1826, she made such appointment. The attestation clause is as follows: "Signed and sealed in the presence of Humphrey Pritchett" and "Mary Eames."

The question is, whether this is sufficient. It depends on the state in which the law was left by the case of *Burdett v. Spilsbury*, in the House of Lords. We are unable to see how, after that decision, the law previously considered to be established by the well-known case of *Wright v. Wakeford* can be considered as in force. It seems to us that it was by the decision of *Burdett v. Spilsbury* really overruled. Now, if that be so, it would be quite clear that this power was well executed. But we are embarrassed by

(a) 4 Sim. 555.

(b) 15 Sim. 78.

1850.
 VINCENT
 v.
 BISHOP OF
 SODOR & MAN.

certain dicta of the noble lords by whom the decision of *Doe v. Spilsbury* was pronounced, in which they say they do not mean to overrule *Wright v. Wakeford*, but leave its authority untouched, and to confine their decision to the cases where the attestation is general, and omits altogether all mention of the formalities required by the power to be attested. But, even if this be so, we still think this power was well executed. It is conceded that the attestation need not follow the words of the power literally. Where the power given is to be exercised by signing and publishing a will, and by having an attestation of both these formalities, it would clearly be well executed, if the attestation expressed that it was signed and delivered; and this was expressly so determined by this Court in the case of *Ward v. Swift*, and by Vice-Chancellor *Shadwell* in *Simeon v. Simeon*.

Now what is the principle which governs these decisions? We think it is this; that if the attestation express, in any form of words, an act to have been done in the presence of witnesses, by which the complete execution of the instrument, as required by the power, appears to have been effected, it will be sufficient; but that, where the framer of the power requires two or more such acts to be done, then if the attestation expresses only the doing of one of them, even though all persons would clearly infer that the other act had also taken place, it will not be sufficient. For in this latter case, it is clear that the framer of the power really intends something more than the act expressed in the attestation, because he has expressly added the other. Thus, in this case, he requires both signing and publishing. The signing, therefore, in the presence of witnesses, though it might naturally and reasonably be also called a publishing, will not alone do, for he expressly says, the will is to be signed in the presence of witnesses, and also published. But here it is both signed and sealed in their presence. Now if sealing in the presence of witnesses be naturally and reasonably to be considered as a publication, and we think it may be so

considered, then we have enough in this attestation to fulfil the whole power, for it is signed in the presence of two witnesses, and it is published also, if being sealed in the presence of witnesses amounts to a publication. And both these acts are here stated in the attestation.

We therefore think, for these reasons, that this power was well executed, and shall certify accordingly.

The following certificate was afterwards sent to the Vice-Chancellor (a):—

“ We have heard this case argued by counsel, and have considered it; and we are of opinion that the said Susanna Ireland’s will, or appointment in the nature of a will, was a due execution of the power of appointment limited or given to her by and contained in the indenture of settlement dated January 28, 1794.

“ FRED. POLLOCK.

“ E. F. ALDERSON.

“ R. M. ROLFE.

“ T. J. PLATT.”

(a) The following certificate had been previously sent to the Vice-Chancellor by the Court of Common Pleas upon a case sent for the opinion of that Court:—

“ This case has been argued before us, and we are of opinion that Susanna Ireland’s will (or appointment in the nature of a will) was a due execution of the power of appointment, limited or given to her by and contained in the indenture of release and settlement of the 28th of January, 1794.”

“ THOS. WILDE,

“ W. H. MAULE,

“ C. CRESSWELL.

“ E. V. WILLIAMS.”

“ May 5, 1849.”

1850.
VINCENT
v.
BISHOP OF
SODOR & MAN.

1850.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

June 17. THE THAMES HAVEN DOCK AND RAILWAY COMPANY
v. BRYMER and Others, Assignees of BROMLEY, a Bank-
rupt.

A declaration in covenant by the assignees of B., a bankrupt, stated, that by a deed between B. of the first part; D. and S. his wife, of the second part; V. and the said B., described as trustees, of the third part; and the Thames Haven Dock and Railway Company, the defendants, of the fourth part; after reciting that certain persons on behalf of the Company had agreed to buy certain premises, and that B. had agreed to sell the same, it was witnessed, that, in consideration of a certain sum already paid to B., and in consideration of the further sum of 2936*l.* to be paid to B., and to V. and B., according to their respective rights and interests in the premises, on or before the 25th of March, 1844, B., D., S., and V. agreed to sell the premises; and that B. would, at his own expense, deduce a good title to the same; and that B., and all other necessary parties, would, on or before the said 25th of March, on payment by the Company of the said sum of 2936*l.*, at the costs and charges of the Company, execute and procure to be executed a proper conveyance for conveying the fee-simple of the premises; and that the Company thereby agreed with B. that they would, on or before the said 25th of March, and on the execution of such conveyance, pay the said sum of 2936*l.*, and until payment of the said sum would pay interest on the same to B. and his assigns; that the 25th of March had elapsed, and although B. before his bankruptcy, and the plaintiffs as his assignees after it, were willing and ready to deduce a good title, and though B. and the necessary parties were ready and willing, on payment by the defendants of the said sum of 2936*l.*, to execute a conveyance, and would have done so, but that the defendants discharged B. and the plaintiffs from deducing such good title, and from executing such conveyance. The declaration then alleged as a breach, that the defendants did not prepare a proper conveyance, nor pay to B. or to the plaintiffs the sum of 2936*l.*, or any part thereof:—*Held*, on error, affirming the judgment of the Court of Exchequer, on special demurrer to the declaration, first, that the assignees of a bankrupt, suing on a deed made to the bankrupt, are not bound to make proof of the deed; secondly, that the breach, that the defendants had not prepared the conveyance nor paid the money, was good, for, as the deed provided that the conveyance was to be *at the costs and charges of the defendants*, it lay on them to prepare it; thirdly, that the execution of the conveyance and the payment of the money were concurrent acts; but that the deduction of a good title by B. was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced; fourthly, that the averment that the defendants *discharged B.* and the plaintiffs from deducing title, though not alleged to have been under seal, was sufficient on *general demurrer*; and, lastly, that it was not necessary to point out the respective interests of B. and others in the money to be paid, as the covenant was not a covenant to pay the principal sum to B. and the others according to their respective interests, and the interest to B., but was a covenant to pay to B. both principal and interest.

The declaration stated “that whereas, heretofore and be-

fore the said W. Bromley became bankrupt, to wit, on the 22nd of April, 1841, by a certain deed then made and entered into between the said W. Bromley, of the first part; one George Dyer, Esq., and Sarah Ann his wife, of the second part; one Petty Vaughan and the said W. Bromley, therein described as trustees under the marriage settlement of the said G. Dyer and Sarah Ann his wife, of a sum of 2300*l.* secured to the said S. A. Dyer by a mortgage of the hereditaments thereafter mentioned, of the third part; and the said Company of the fourth part: After reciting that by certain conditions of sale, the premises thereafter and hereinafter mentioned had been advertised to be sold by auction on the 27th of May, 1836, unless an acceptable offer were previously made by private contract, and that by a memorandum indorsed on one of the said particulars and conditions of sale, dated 17th of May, 1836, James Lamnerez Jephson, Esq., and Ernest Vaux, Esq., therein respectively described, on behalf of themselves and the other members of the committee of the said therein proposed Thames Haven Railway Company, agreed to purchase the said premises at the sum of 5000*l.*, and to complete the same agreeably to the conditions of sale, provided the Bill then in Parliament for such railway should pass into a law, and the said W. Bromley agreed to sell the same; and after further reciting that the said railway Company obtained such Act of Parliament, and had entered into the arrangement thereafter and hereinafter mentioned for the payment of the said purchase-money, &c.: It was witnessed, that in consideration of the sum of 2500*l.*, at the time of the execution of that agreement paid to the said W. Bromley, by the consent and with the approbation of the said G. Dyer and Sarah Ann his wife, and the said P. Vaughan, and in consideration of the further sum of 2936*l.* 17*s.* 9*d.* to be paid to the said W. Bromley, and to the said P. Vaughan and W. Bromley, according to their respective rights and interests in the premises, on or before

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BAYNER.

1850.
THAMES
HAVEN DOCK
CO.
v.
BEYMER.

the 25th of March, 1844, the said W. Bromley, G. Dyer and Sarah Ann his wife, and P. Vaughan thereby agreed with the said Company, the now defendants, to sell to them certain messuages, lands and premises, with the appurtenances in the said deed particularly mentioned; and that the said W. Bromley would, at his own expense, except so far as the same was otherwise provided for by the said Act in cases of lands taken and purchased by the said Company, deduce a good title to the said hereditaments and premises, subject to the conditions following, that is to say, &c.; and that the said W. Bromley, and his heirs and assigns, and all other necessary parties, would, on or before the said 25th of March, 1844, on payment by the said Company of the said sum of 2936*l.* 17*s.* 9*d.*, at the costs and charges of the said Company, their successors and assigns, execute and procure to be executed a proper conveyance for conveying and assuring the fee simple and inheritance of and in the said hereditaments, with their appurtenances, unto the said Company, their successors and assigns, free from all incumbrances except the payment of an annual quit-rent of 2*l.* 14*s.* and land tax. And the said Company thereby agreed with the said W. Bromley and his assigns, that they, their successors or assigns, would, on or before the said 25th of March, 1844, and on the execution of such conveyance as aforesaid, pay the said sum of 2936*l.* 17*s.* 9*d.*, and would in the meantime, and until the payment of the said 2936*l.* 17*s.* 9*d.*, pay interest upon the same sum after the rate of 5*l.* for every 100*l.* by the year, by equal half-yearly payments, on the 25th of March and the 25th of September in every year, unto the said W. Bromley, his executors, administrators, and assigns, &c.; and that the said 25th of March, A.D. 1844, had elapsed before the commencement of this suit. And although the said W. Bromley, before he became bankrupt, and the plaintiffs as assignees as aforesaid after such bankruptcy, for a long time before, and on and after the said 25th of March, 1844, were

respectively ready and willing, at the expense of him the said W. Bromley, before he became bankrupt, and of the plaintiffs as assignees after such bankruptcy, except so far as the same has been otherwise provided for by the said Act in cases of land taken and purchased by the said Company, to deduce a good title to the said hereditaments and premises, subject to the said conditions in the said deed mentioned in that behalf; and although the said W. Bromley, and his heirs and assigns, and all other necessary parties, for a long time before and on the 25th of March, A.D. 1844, were ready and willing, on or before the day and year last aforesaid, on payment by the said Company of the said sum of 2936*l.* 17*s.* 9*d.*, at the costs and charges of the said Company, their successors or assigns, to execute and procure to be executed a proper conveyance for conveying and assuring the fee simple and inheritance of and in the said hereditaments, with their appurtenances, unto the said Company, their successors and assigns, free from all incumbrances, except the payment of the said annual quit-rent of 2*l.* 14*s.*, and land-tax; and although the said W. Bromley, before he became bankrupt, and the plaintiffs as assignees as aforesaid after such bankruptcy, during all the time in that behalf aforesaid, would, at such expense as in that behalf aforesaid, except as aforesaid, have deduced a good title to the said hereditaments and premises, subject as in that behalf aforesaid; and the said W. Bromley and his heirs and assigns, and all other necessary parties, during all the time in that behalf aforesaid, would have executed and procured to be executed a proper conveyance for conveying and assuring the fee simple and inheritance aforesaid unto the said Company as aforesaid, free from all incumbrances except as aforesaid, of all which the said Company, to wit, on the said 25th of March, 1844, and long before, that is to say, from the day of executing the said deed, continually had notice; but that the said Company, to wit, on the said 25th of March, 1844, discharged

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYMER.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYMER.

the said W. Bromley and the plaintiffs, as such assignees as aforesaid, from deducing such good title as aforesaid, and from the execution of such conveyance as aforesaid. Yet the said Company did not nor would regard or keep their said covenant in that behalf, and did not nor would prepare such proper conveyance as aforesaid, for such execution as aforesaid, or otherwise; nor pay to the said W. Bromley, or to the plaintiffs, as such assignees as aforesaid, the said sum of 2936*l.* 17*s.* 9*d.*, or any part thereof; and have altogether neglected and refused so to do, &c.

The declaration contained a second breach, which was abandoned in this Court and in the Court below by the plaintiffs' counsel.

The defendants below demurred specially to this declaration, but the only objection pointed out by the special demurrer was the want of profert.

The case was argued in this Court (Feb. 7)(a), by

Peacock for the plaintiffs in error, the defendants below. —The declaration is bad on several grounds. In the first place, there is no averment of profert of the deed on which the plaintiffs below sue, and there is no excuse for want of profert. The case of *Gray v. Fielder* (b) will be relied upon by the defendants in error. That decision proceeded upon the ground that the assignees of a bankrupt had no means of obtaining the bond upon which the action was brought. But, under the bankrupt law as it then stood, the debt passed to the assignees, but the security did not. The 64th section of the 6 Geo. 4, c. 16, differs in this respect from the old statute of 1 Jac. 1, c. 15; for, by the 64th section, the assignees become entitled to all the deeds relating to the lands of a bankrupt. Although in general a party who comes in by operation of law need not make profert, yet if the deed belong to him, he must shew it, though he come to the estate

(a) Before *Patteson, J., Coleridge, J., Wightman, J., Cresswell,* J., and *Williams, J.*
 (b) Cro. Car. 209.

by act of law: Com. Dig. tit. "Pleader" (O. 8), (O. 9). An administrator who sues upon a deed of his intestate must make profert. Here the deed clearly belonged to and was in the possession of the bankrupt, and an equal right to it vested in his assignees: for it could not be contended that the bankrupt had no such title to the deed; if that were so, the declaration would clearly be bad. The rule which makes profert necessary, was established for the benefit of defendants; and if it be not made, a valid excuse for such omission at all events is necessary: *Hodgson v. Warden* (a). The bankrupt's interest in the deed, if the bankruptcy had not occurred, would have entitled him to sue upon the deed, and the assignees come in by act of law, with the possession of the deed.

Secondly, the breach is bad. The defendants below were not bound by the terms of the covenant to prepare the conveyance. The payment is to be made by them upon the execution of the conveyance; no doubt, if they had sued the bankrupt for not executing the conveyance, they must have previously tendered him a conveyance for his execution. In Sugden's Vendors and Purchasers, p. 260, 11th edit., it is said, that "in agreements for purchase, the covenants are construed according to the intent of the parties, and they are therefore always considered dependent where a contrary intention does not appear." . . . "If, therefore, either a vendor or vendee wish to compel the other to observe a contract, he immediately makes his part of the agreement precedent; for he cannot proceed against the other without an actual performance of the agreement on his part, or a tender and refusal." [*Coleridge, J.*—Is not the agreement that Bromley is to execute the conveyance at the costs and charges of the Company, an agreement that the Company are to prepare the deed?] To enable either party to enforce the performance of the agreement,

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYMER.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYMER.

it is necessary that the deed should be first prepared by the party who is desirous to enforce it. See *Standley v. Hemmington* (a), *Phillips v. Fielding* (b), and *Doe d. Clarke v. Stihwell* (c). [Maule, J.—Such a construction would, as it appears to me, be contrary to the express terms of the contract, by which the vendee is to prepare the conveyance, and the vendor is merely to execute it and to receive the money.]

Thirdly.—The declaration does not contain any averment that Bromley, or the assignees, deduced a good title, which is a condition precedent to their right to sue the Company. The purchasers could not tell what the title was; an abstract of title ought, therefore, to have been delivered to them. And the allegation that the Company discharged him does not state the discharge to have been under seal, and is therefore insufficient. The discharge must be effected by an instrument of as high a nature as that by which the liability is created: *Goss v. Lord Nugent* (d), *Harvey v. Grabham* (e). [Maule, J.—May it not be presumed that the discharge was effected by apt means?] The defective allegation might be cured by verdict, but the objection is good on general demurrer, or after judgment by default: *Collins v. Gibbs* (f), *Stennel v. Hogg* (g). [Maule, J.—In old times, before the statute of Anne, you might have taken any objection to the pleadings at common law; but that statute says, that there are certain objections of which you shall not be at liberty to avail yourself unless you specify them. Before that statute a demurrer was both general and special. But what statute is there by which a judgment on *general* demurrer and judgment by default are put upon the same footing?] The

(a) 6 Taunt. 561.

(b) 2 H. Blac. 123.

(c) 8 A. & E. 645.

(d) 5 B. & Ad. 58.

(e) 5 A. & E. 61.

(f) 2 Burr. 899.

(g) 1 Wms. Saund. 228 a, note.

defect is one to which the statute of Anne does not apply; it is open to objection without being specifically pointed out. A verdict only cures these defects where the finding of the jury is upon the precise point. In *Bird v. Higginson* (a), in the Exchequer Chamber, the Court said, that they could not assume on general demurrer that a demise of certain incorporeal hereditaments was by deed. [*Maule, J.*—In that case the demise might have had some operation if it had not been by deed, for it included corporeal as well as incorporeal hereditaments. But if a man says that he has granted a rent-charge, he must mean that he has done it by deed, for if it is not by deed it is nothing.] This is a defective statement at common law, and is not cured by statute: *Harris v. Goodwyn* (b), *Patrick v. Balls* (c).

Fourthly.—The breach for nonpayment of the money is bad; for by the recital in the covenant, the payment of the purchase money is to be made to Bromley and Vaughan according to their respective rights and interests in the premises. The declaration therefore should have contained a precise statement of the amount of the respective interests of the parties, and should have alleged that the Company had notice of the same. The Company were not able to determine what those rights were; that was a fact peculiarly within the notice of the vendors of the property. The covenant must be read as controlled by the recital: *Hesse v. Albert* (d). [*Patteson, J.*—The breach is, that the Company did not pay the money, or any part thereof, to Bromley. Now as it is to be taken that Bromley had some interest, would not that be sufficient to support a nominal verdict?] The Company are not bound to pay any portion of the money until they are bound to pay the whole amount. As this matter was peculiarly in the ven-

1850.
THAMES
HAVEN DOCK
CO.
v.
BRYNER.

(a) 6 A. & E. 824.

(b) 2 M. & Gr. 405.

(c) Carth. 390.

(d) 3 Man. & Ry. 406.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYMER.

dors' knowledge, notice ought to have been given of it to the other purchasers: Vin. Abr. tit. "Notice," p. 5, pl. 12; *Vyse v. Wakefield* (a), *Foxe v. Goodson* (b), *Webb v. Cowdall* (c).

Cowling, for the defendants in error.—Assuming the deed to have been necessarily in the possession of the bankrupt, inasmuch as the action is brought by his assignees, they are not bound to make profert. *Gray v. Fielder* is a clear authority, that where a party is in by operation of law, the necessity for profert does not exist. The principle of that case was fully recognised in the recent decision of *Jenkin v. Peace* (d), where Lord Abinger, C. B., says, "The next exception, and that, in fact, on which the defendants rely, is that of conveyances under the Statute of Uses. And the reason for this seems to be given in *Stockman v. Hampton* (e), viz. that the party pleading has not possession of the deed, nor any means to obtain it; and so accords the case of *Gray v. Fielder*, where, in debt on bond assigned by commissioners of bankrupt, profert was not made, and yet it was held good, 'because,' says the Court, 'he is in by act of law, and had no means to obtain the obligation.'" See also Com. Dig. "Pleader," (O. 8, 9). The assignees come in adversely to the bankrupt. Under the stat. 13 Eliz. c. 7, s. 2, it is apprehended that the commissioners had power to assign over the deeds of the bankrupt relating to his landed estate; and the 3rd sect. of 1 Jac. 1, c. 15, extends the provisions of the statute of Elizabeth to cases within the latter Act. [*Maule, J.*—The statute of James does not in terms give the deeds to the commissioners. In *Gray v. Fielder*, the Court seem to have been inclined to think that the Acts did not enable the commissioners to get the bond.] Under the words "goods and chattels" of the bankrupt, the bonds

(a) 6 M. & W. 442.

(b) Cro. Eliz. 276.

(c) 14 M. & W. 820.

(d) 6 M. & W. 722.

(e) Cro. Car. 441.

would pass to the assignees. The 64th section of the 6 Geo. 4, c. 16, does not purport to pass all deeds, but those only relating to land. The assignees had the same power of obtaining the bankrupt's deeds at the time of the decision of *Gray v. Fielder*, as they have now; and that case has been constantly acted upon up to the present time. [*Wightman, J.*—The difficulty which presents itself to me is, whether the fact that the bankrupt has the deed, which he refuses to give up, would not be a good excuse to the assignees for non-profert.] If profert be necessary, the refusal by the bankrupt to deliver up the deed to the assignees would not be a valid excuse for not alleging profert: *Hodgson v. Warden* (a). If the rule were established that profert is necessary in such a case as the present, it would have the effect, in many cases, of precluding the assignees from bringing actions upon the bankrupt's deeds. The rule seems to be well laid down in *Leaffield v. Helicar* (b), where it was held, that a person who justifies as servant to a patentee must shew the patent; for the Court said, that, as "he derives his title from the patentee, not by act in law, but by his command, he ought to shew the letters patent, as well as he who claims interest under the patent by assignment; but he who claims interest under an act in law, (for that he had no means to compel the patentee to shew it,) may justify without shewing it." It may be, that a party who is in at common law is not in adversely, and that the rule is different where the party is in by statute.

Secondly. It has been objected, that the declaration is bad, for not averring that Bromley or the assignees tendered a conveyance for execution; but the language of the covenant, that Bromley would, "at the costs and charges of the Company," execute a conveyance, makes it perfectly clear that the Company were the party by whom the conveyance was to be prepared. The declaration alleges readiness and wil-

1850.
THAMES
HAVEN DOCK
CO.
v.
BRYNER.

(a) 13 M. & W. 22.

(b) Cro. Jac. 317.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYNER.

lingness on the part of the vendor to execute it, and that averment is sufficient: *Laird v. Pim* (a), *Peole v. Hill* (b), and 2 Saund. 252 b, note c. *Standley v. Hemmington* (c) was the case of an award; and it may be that the party who wishes to enforce the award by attachment cannot do so without first tendering a conveyance. [*Patteson, J.*—You need not trouble yourself further upon this point, as we all think it perfectly clear that it was the duty of the Company to prepare the conveyance.]

Thirdly. The making a good title was not a condition precedent. On the 17th of May, 1836, the estate was purchased by the defendants below; and since that time they have treated the estate as conveyed to them. They paid part of the money, and agreed to pay the remainder at a given date on execution of the conveyance, and interest in the mean time. The covenant with respect to deducing title is not a condition precedent, but is an independent covenant, according to the well-known rule laid down in *Pordage v. Cole* (d), which is illustrated by the cases of *Wilkes v. Smith* (e), *Dicker v. Jackson* (f), and *Quarrington v. Arthur* (g). [*Williams, J.*—The deduction of title may have been necessary as the foundation of the conveyance. What use would there be in deducing the title after the execution of the conveyance?] There is nothing to shew that it was necessary to deduce the title in order to prepare the conveyance. No time is specified within which the title was to be deduced. But admitting it to be a condition precedent, the averment of discharge is sufficient. It is admitted that the discharge, in order to be valid, must be under seal; but this objection is on general demurrer, and therefore fails. If the objection had been pointed out on

(a) 7 M. & W. 474.

(b) 6 M. & W. 835.

(c) 6 Taunt. 561.

(d) 1 Wms. Saund. 319 c.

(e) 10 M. & W. 355.

(f) 6 C. B. 103.

(g) 10 M. & W. 335.

special demurrer, it might have been otherwise. Upon a traverse of the discharge, it would become necessary to prove the discharge to have been by deed. The objection, therefore, goes rather to the evidence than to the averment.

Lastly. The breach is good. This objection is upon general demurrer. By the language of the covenant, both principal and interest are to be paid to Bromley. The words "to the said Bromley," apply to the principal debt as well as to the interest payable thereon. It appears upon the face of the instrument what the respective rights of the parties were, and therefore no notice was necessary. Bromley was to receive all the money, to keep part for himself, and to hold the remainder as co-trustee with Vaughan. But even upon the assumption that such is not the proper construction of the deed, the breach is sufficient upon general demurrer, as it would be sufficient to sustain a verdict with nominal damages; for it is clear that Bromley had some interest, and therefore was entitled to a verdict for something.

Peacock, in reply.—With respect to profert, a party who comes in by operation of law is presumed to have the instrument, and must therefore either make profert, or allege a valid excuse for not making it. The assignees are in the same situation as the bankrupt himself with respect to defendants. If, in an action upon the deed, the defendants were to give the assignees notice to produce it, the defendants would be entitled to give secondary evidence of its contents. If the assignees cannot obtain the deed, they may, perhaps, be precluded from bringing an action upon it. The case of an administrator, who is unable obtain the deed of his intestate, is a parallel case to the present. He would still be under the necessity of making profert. Suppose an action on a bond, and the declaration were not to set out the condition, the defendant would be subject to great injustice if he were not allowed to see the bond. [*Williams*, J.—In the case of an administrator, the law considers the

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYCKER.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BROMLEY.

administrator and the heir as identical with the party whom they represent.] The defendant ought not to be in a worse position, where the action is by the assignees of a bankrupt, than he would have been if the bankrupt himself had brought the action.

Secondly. The making out a good title is a condition precedent, according to the case of *Glazebrook v. Woodrow (a)*, where the covenant was similar to the present.

Lastly. The breach is bad. The words, that payment is to be made "to the said William Bromley," apply only to the payment of interest. The Company therefore could not safely make payments to the assignees without notice of the bankrupt's interest.

Cur. adv. vult.

The judgment of the Court was now delivered by

PATTESON, J.—This was an action of covenant by the assignees of William Bromley, a bankrupt, against the Company, upon a deed, by which Bromley agreed to sell, and the Company to purchase, certain lands. There was a special demurrer to the declaration.

Three points were argued before us: first, whether the assignees of a bankrupt, in suing on a deed made to the bankrupt, are bound to make profert, or excuse for not doing so.

Secondly, whether the breach which charged that the Company did not prepare a conveyance or pay the purchase money, was well assigned.

Thirdly, whether the deducing a good title by Bromley was a condition precedent, and if it were, whether a sufficient discharge from doing so by the Company was shewn.

As to the first question, the case relied on by the assignees is that of *Gray v. Fielder*. That case is recognised by the Court of Exchequer in *Jenkin v. Peace*, and is classed

with *Stockman v. Hampton*, and other cases, in which it is laid down, according to the rule in *Dr. Leyfield's Case* (a), "that a party pleading is not obliged to make profert of a deed, when he has not the possession of it, nor any means of obtaining it." It is also cited by Lord *Hale*, in the note (b), Co. Litt. 35. b., and in Com. Dig. "Pleader" (O. 8, 9), and in Bac. Abr. "Pleas and Pleading," (I. 12). On the other hand, a distinction was attempted to be pointed out between the language and effect of the statute 1 Jac. 1, c. 15, which was in force when *Gray v. Fielder* was decided, and the 6 Geo. 4, c. 16, which was in force when this case arose. But on examination of the statutes, we find no such distinction. The 13th section of the former, and the 63rd section of the latter Act, are precisely the same, and the 64th section of the latter Act, which was adverted to, relates only to deeds concerning real estate, which may be purchased by or descend or come to the bankrupt. By both Acts, the commissioners are directed to assign all debts of the bankrupt to the assignees, and the property in such debts is vested in the assignees, in the same manner as if the deeds or other assurances relating to them had been made to the assignees themselves; and they are empowered to sue in their own name, in like manner as the bankrupt might have done. Both Acts give the commissioners power to seize all the bankrupt's effects.

The case of *Gray v. Fielder* has now been acted on for so many years, and the law on this subject has been so long considered as settled, that whatever plausible arguments may now be raised against it, we think it ought not to be unsettled, and that the assignees of a bankrupt are not bound to make profert of any deed made to the bankrupt, on which they may sue.

The true rule seems to be, not that whoever has the deed, or a right to it, must make profert, but that whoever has the deed, or might have it but for his own default or

1850.
THAMES
HAVEN DOCK
CO.
v.
BRYNER.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BRYNER.

that of some one whose default binds him, must make pro-
 fert.

With respect to the second question, we all agreed on the argument, that, as the deed provides that the conveyance should be at the costs and charges of the Company, it lay on them to prepare it; and such is the general course as between vendor and purchaser: the breach, therefore, is well assigned.

The argument that the Company could not prepare a conveyance without an abstract of title, leads to the third question, whether the deducing title be a condition precedent. We agree with the Court of Common Pleas, in *Dicker v. Jackson*, that the rule is correctly laid down in the note to *Pordage v. Cole* (a), viz. that "if a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen, or *may* happen, *before* the thing, which is the consideration of the money or other act, is to be performed, an action may be brought for the money, or for not doing such other act, *before* performance; for it appears that the party relied on his *remedy*, and did not intend to make the *performance* a condition precedent." Applying this rule to the present case, we find that the deed is dated the 22nd of April, 1841. The covenant of Bromley is to deduce a good title to the premises (not saying *when*), and, on or before the 25th of March, 1844, on payment by the Company of 2936*l.* 17*s.* 9*d.* to execute a proper conveyance. The covenant of the Company is, on or before the 25th of March, 1844, and on the execution of such conveyance, to pay the money. It is plain, therefore, that the execution of the conveyance and the payment of the money were intended to be concurrent acts. The day for the payment of the money could not happen before the thing which was the consideration for it, viz. the execution of the conveyance, was to be performed. The conveyance was to be prepared by the Com-

(a) 1 Wms. Saund. 320 b.

pany. So far as regards the execution of a conveyance by Bromley, an averment of readiness and willingness on his part to execute it, if it had been prepared by the Company, might be sufficient to entitle the assignees to maintain this action for not preparing the conveyance and paying the money; but the Company contend that they could not prepare a conveyance until a good title had been deduced by Bromley according to his covenant; therefore that such deduction of title was necessarily a condition precedent. We are of opinion that they are right in so contending. The recitals to be introduced into the conveyance, and even the names of the persons who were to be parties to it, could not be known to the Company with any certainty until the title had been deduced. Then follows the averment in the declaration, that Bromley and the assignees were ready to have deduced a good title, but that the Company discharged the said W. Bromley and the plaintiffs as such assignees as aforesaid from deducing such good title as aforesaid, and from the execution of such conveyance as aforesaid.

The Company contend that this averment is not sufficient, inasmuch as it is not shewn that the discharge was by deed. This objection, however, is not pointed out as a special cause of demurrer. It is conceded by the learned counsel for the assignees, that the discharge would not be good unless it were by deed; but he says, that if the averment had been traversed, it could not have been proved otherwise than by production and proof of a deed: *Goss v. Lord Nugent*; and so he contends that, on general demurrer, it must be taken to have been by deed, the only way in which it can be good; and so it was decided in the Court of Exchequer.

In *Harvey v. Graham*, a similar objection arose on demurrer; but there it appeared on the pleadings that an agreement, necessarily in writing, had been partially waived by word of mouth. To make that case apply, the defendants should have pleaded that the discharge was by word of

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BATHUR.

1850.
 THAMES
 HAVEN DOCK
 Co.
 v.
 BROMLEY.

mouth, or by an instrument not under seal. In *Collins v. Gibbs*, the objection arose in arrest of judgment, after interlocutory judgment by default; but that was a total omission to aver performance of a condition precedent, not an informal averment, as here. In *Bird v. Higginson*, on demurrer, the pleadings shewed the instrument not to be under seal. In *Harris v. Goodwyn*, to an action of covenant, a plea was pleaded, setting up a promise not to sue, which was traversed by the replication, and a verdict found for the defendant; but the Court held the plaintiff entitled to judgment non obstante veredicto, for that they could not intend that the promise not to sue was by deed. The plea there was very special, and could not, by any reasonable construction, be held to import that there was a deed between the parties. Here the averment is in the most general terms, that the defendants discharged Bromley and the plaintiffs. In *Harris v. Goodwyn*, the plea alleged a promise and undertaking of the plaintiff; here the declaration alleges only the fact of discharging. Upon the whole, we think that the Court of Exchequer was right in holding the averment sufficient upon general demurrer.

Another objection was taken to the breach, for informality in not pointing out the respective interests of Bromley and the other parties in the sum to be paid. This again was not pointed out as cause of demurrer, and we think that the words "unto the said William Bromley," at the end of the covenant to pay the money, are to be read as referring to the principal money as well as the interest, which makes it unnecessary to point out what part of the money belonged to him and what to others, since the covenant is to pay the whole to him.

For these reasons, we are of opinion that the judgment must be affirmed.

Judgment affirmed.

1850.

June 19.

JONES v. CANNOCK.

IN this case (a), the Court of Exchequer having discharged the rule obtained by the defendant below to arrest the judgment, and judgment having been signed, and a writ of error having been brought thereon, the case was now argued (b) by

In an action of covenant upon a farming lease, the declaration alleged (inter alia) that the plaintiff and defendant did, by the said instrument, covenant and agree that the lessor (the defendant) should, within eighteen months from the date of the lease, build a new shed and stalls for feeding cattle complete, at the upper end of a certain barn, &c., the whole of which was agreed to be left to the superintendence of the lessee and the lessor's son:—*Held*, on error, (in affirmance of the opinion of the Court of Exchequer on motion to arrest the judgment,) that the stipulation in the lease, that the work should be left

Atherton for the plaintiff in error, the defendant below.—The declaration is bad. The covenant alleged is, that the defendant agreed to erect certain buildings within the period of eighteen months, “the whole of which were to be left to the superintendence of the plaintiff and Edwin Jones, the defendant’s son.” Now it is submitted, that the superintendence of the plaintiff was a condition concurrent with the duty of the defendant to erect the buildings. The declaration therefore ought to have alleged, that the plaintiff was ready and willing to superintend the works; and it is bad because it does not contain that allegation. Where some act is required to be done on the part of the covenantee, at the same time as another act is to be done on the part of the covenantor, and an action is brought for the nonperformance by the covenantor of the act in question, the declaration must contain an allegation, that the covenantee was ready and willing to perform his part: 1 Wms. Saund. 320, notes, and 2 Wms. Saund. 352. The covenant is pleaded according to its legal effect; and if there be any ambiguity in the language of the covenant, such a construction is to be adopted as will operate most strongly against the party pleading it. It might be a matter of great importance to the

to or concurrent

to the superintendence of the parties named, was not a condition precedent to the covenant on the part of the defendant to do the work.

(a) See the pleadings set out, 3 Exch. 233.

(b) Before *Patteson, J., Coleridge, J., Wightman, J., Cresswell, J., Erle, J., Williams, J.: Talfourd,*

J., was present, but did not join in the judgment of the Court, he having been engaged as counsel in the case.

1850.
JONES
v.
CANNOK.

defendant that the plaintiff's son should have the superintendence of the work, which would preclude the plaintiff from complaining of the way in which it had been executed. [*Cresswell, J.*—There is nothing in the covenant which gives the parties who are to superintend the work, authority to say how it is to be done.]

Peacock, contra.—The declaration is good, and the judgment of the Court below ought to be affirmed. According to the legal effect of the covenant, the superintendence of either party is not made a condition precedent or concurrent. They are to be at liberty to superintend the work whilst it is going on, at any time; but no time is fixed when they are to be present. It is a mere permission, which either party may avail himself of if he thinks fit.

Atherton replied.

PATTESON, J.—We are all of opinion that the clause in question is neither a condition precedent nor concurrent. The covenant is an absolute one, that the defendant shall do the work within the period of eighteen months; and the succeeding clause was, as it appears to us, inserted for the benefit of both parties, which they were at liberty to avail themselves of if they should think fit to do so. The language of the covenant is no doubt obscure; but as we think that the words do not import a condition, the declaration, as it now stands, is good, and the judgment of the Court below must be affirmed.

Judgment affirmed.

1850.

SUTHERLAND v. WILLS.

June 19.

MURRAY, Executrix of C. NORRIS, v. WILLS.

IN the first of these cases (a), a writ of error had been brought on the two following grounds: first, that the action was wrongly brought by the plaintiff below; and secondly, that it did not appear that the defendant below sealed and delivered the indenture mentioned in the declaration. The case was argued (b) by *T. Jones* for the plaintiff in error, and *G. R. Clarke* for the defendant in error.—In the second case the first point alone arose, and was argued by *Peacock* for the plaintiff in error. The arguments were in substance the same as those in the Court below. The following additional cases were cited: *Chapman v. Milvain* (c), *Sheen v. Rickie* (d), *Aston v. Brevitt* (e), *Everett v. Cooch* (f), and *Jeffery v. M^c Taggart* (g).

In covenant by the plaintiff as secretary of a Joint-stock Company, for calls, the declaration stated, that, by indenture made by and between the several persons whose names and seals were or might thereafter be thereunto subscribed, and who had sealed and delivered, or who might seal and deliver the same, of the first part; and W. and M., persons nominated to be covenantees for the benefit of the Company, of the second part;

PATTESON, J.—We are all clearly of opinion that the decision of the Court of Exchequer was perfectly correct. With respect to the first question, it appears by the recital of this Act, that this indenture is the indenture upon which the Company was founded, as it is recited in the preamble

the parties of the first part covenanted with the parties of the second part, (inter alia), to pay the calls. Averment, that, whilst the defendant was a shareholder, “and after the execution by the defendant of the said indenture as aforesaid,” the directors made a call. Breach, non-payment. The declaration contained no direct averment that the defendant executed the indenture. By the 4 & 5 Vict. c. xciii., after reciting that difficulties had arisen in legal proceedings by or against the Company, since, by law, all members must be named in such proceedings, and that it was expedient that the Company should be rendered capable of suing and being sued in the name of a nominal party, it was enacted, that, in all actions by or on behalf of the Company, it should be sufficient to proceed in the name of the secretary as the nominal plaintiff:—*Held*, on writ of error, first, that the statute authorised the secretary to sue on this covenant; and, secondly, that the words “after the execution by the defendant of the indenture as aforesaid,” implied that the defendant had subscribed, sealed, and delivered the indenture, and that they were, upon general demurrer, equivalent to such an averment.

(a) See the cases, 4 Exch. 211 and 843.

(c) 5 Exch. 61.

(d) 5 M. & W. 175.

(b) Before *Patteson, J., Maule, J., Wightman, J., Cresswell, J., Erle, J., Williams, J., and Talford, J.*

(e) 2 D. & L. 903.

(f) 7 Taunt. 1.

(g) 6 M. & Selw. 126.

1850.
SUTHERLAND
v.
WILLS.
MURRAY
v.
WILLS.

of the Act. That part of the argument of the learned counsel for the plaintiff in error, in which he contends that the case does not come within the precise mischief recited in the preamble of the Act, namely, "that difficulties have arisen and may hereafter arise in legal proceedings by or against the said Company, since, by law, all members for the time being of the said Company must be named in such proceedings," may be to a certain extent correct. And it is contended in this particular case of suing upon this deed, where the covenant of the shareholders is made with certain covenantees, for the benefit of the Company, that those covenantees might have brought the action, and therefore that it is not within the mischief of the preamble, inasmuch as the *whole* of the Company need not have been parties to the action. It is very true that the case may not be within that particular mischief, but that is not the only mischief against which the Act provides; for the words in the enacting part of the section go far beyond the particular mischief recited in the preamble, which is by no means uncommon in Acts of Parliament. These words are very general and comprehensive: "that in all actions, suits, and other legal proceedings, &c., to be hereafter instituted or prosecuted by or on behalf of the said Company," &c. Now this is an action which is "instituted" not only "on behalf of the Company," but "by the Company." The words "instituted by the said Company," do not mean that the action is to be brought in the names of the members of the Company. That could not be so, as the members of the Company are not incorporated, and therefore the action could not be brought in the name of the Company; but still the proceedings are instituted by the Company, that is, for the benefit of the Company. The Act goes on to say, that "it shall be sufficient to state and to proceed in the name of the secretary or one of the directors for the time being of the Company, as the nominal plaintiff representing the Company in such proceedings." The learned counsel for the plaintiff in

error founded an argument upon the words "representing the Company," that, inasmuch as the plaintiff under the Act must be a plaintiff representing the Company, the secretary can only be the nominal plaintiff when the individuals of the Company would be the plaintiffs. But such a deduction does not by any means follow, for the secretary represents the Company, in the same way as the covenantees represent the Company. It is quite plain, therefore, that it was the object of the legislature to substitute the secretary for any other person who was to sue, whenever the action was instituted by or on behalf of the Company. That this action is so instituted is quite clear, and becomes even more so upon reference to the 4th section, for that section refers to actions to be brought by the Company against one of their shareholders, and one cannot conceive an action so brought, except on the deed to which the shareholders are parties.

1850.
 SUTHERLAND
 v.
 WILLS.
 MURRAY
 v.
 WILLS.

With respect to the remaining question, as to the absence of an averment that the defendant executed, or rather that he sealed the deed, we think the objection might be open on *special* demurrer, as was said by the Court of Exchequer, and they intimated a strong opinion to that effect, as it is not directly averred that the parties signed, sealed, and delivered the deed. The deed itself requires that the persons who should become such shareholders should not only seal and deliver, but subscribe the deed. The words are, "whose names and seals should be thereunto subscribed, and who had sealed and delivered, or who might from time to time seal and deliver the same." The language is not very correct, for it is difficult to see how the party's seal is to be subscribed.

It is contended that the allegation in the latter part of the declaration, "that whilst the defendant was such shareholder and proprietor of 200 shares in the capital of the said Company, and *after the execution* by the defendant of the said indenture or deed of settlement as aforesaid," does not im-

1850.
SUTHERLAND
v.
WILLS.
MURRAY
v.
WILLS.

ply either that the defendant sealed or subscribed his name to that instrument. The Court of Exchequer have already remarked, that the words "as aforesaid" mean a particular mode of executing the deed, namely, not only by sealing and delivering it, but by signing the party's name to it, which might not be necessary in the execution of an ordinary deed. And the Court below said, that the allegation means that the defendant executed the deed with all the formalities required by the deed of settlement, namely, that he should subscribe, and seal and deliver it; and after judgment by default, there being no special demurrer on that ground, and a writ of error being brought, it is the same as if there had been a general demurrer. We are all of opinion that the averment is sufficient on *general* demurrer.

With respect to the subscribing, I do not think that was so much urged, but Mr. *Jones* says "executed" does not mean "sealing." Now "executed" is a very general word. "Executed as aforesaid" must mean executed with all the formalities necessary to the completion of the deed; and therefore it is an averment (although an indirect one) that the plaintiff did so execute the deed. We therefore think that the defendant in error is entitled to our judgment, and that the judgment of the Court below must be affirmed.

Judgment affirmed.

MEMORANDA.

IN Trinity Vacation, (in July), Lord *Cottenham* resigned the Great Seal, in consequence of continued indisposition; and was raised to the dignity of a Viscount and Earl of the United Kingdom, by the titles of Viscount *Crowhurst*, of Crowhurst, in the county of Surrey, and Earl of *Cottenham*.

The Great Seal was for a short time placed in commission, the Lords Commissioners being the Right Hon. Lord *Langdale*, Master of the Rolls; the Right Hon. Sir *Lancelot Shadwell*, Knt., Vice-Chancellor of England; and Baron *Rolfe*. On the 15th of July, it was delivered to Sir *Thomas Wilde*, Knt., Lord Chief Justice of the Court of Common Pleas, with the title of Lord Chancellor, and he was raised to the peerage by the title of Baron *Truro*, of Bowes, in the county of Middlesex.

Sir *John Jervis*, Knt., her Majesty's Attorney-General, was appointed to the vacant office of Lord Chief Justice of the Court of Common Pleas, and was sworn of her Majesty's Privy Council. On being called to the degree of the coif, he gave rings with the motto "*Venale nec auro.*"

Sir *John Romilly*, Knt., her Majesty's Solicitor-General, succeeded to the office of Attorney-General; and *Alexander James Edmund Cockburn*, Esq., Q. C., was appointed her Majesty's Solicitor-General, and was knighted.

Later in this Vacation, (in August), Sir *Lancelot Shadwell*, Vice-Chancellor of England, died; and Vice-Chancellor Sir *James Wigram*, owing to bodily infirmity, resigned his office.

Shortly before Michaelmas Term, Baron *Rolfe* was appointed to the office of Vice-Chancellor, in the room of Sir *Lancelot Shadwell* (a), and was sworn of her Majesty's Privy Council, and in December following was created a Peer, by the title of Baron *Cranworth*, of Cranworth, in the county of Norfolk. And in Michaelmas Term, *Samuel Martin*, of the Middle Temple, Esq., one of her Majesty's counsel, was appointed a Baron of this Court in his room, having been first called to the degree of the coif, on which occasion he gave rings with the motto "*Labore*." Shortly afterwards he received the honour of knighthood.

In Michaelmas Term, Mr. Serjt. *Allen* and Mr. Serjt. *Wilkins* received patents of precedence.

(a) The statute 5 Vict. c. 5, s. 21, prohibits the appointment of a successor to "the Vice-Chancellor secondly appointed under the authority of that Act,"—i. e. to Sir *James Wigram*.

Exchequer Reports.

MICHAELMAS TERM, 14 VICT.

KNIGHT v. FOX and Another.

1850.

Nov. 5.

CASE.—The declaration stated, that the defendants were, by themselves and their servants, in the course of erecting a railway bridge and viaduct across a certain public highway, and for that purpose had erected a scaffold upon the said highway; and that it then became and was the duty of the defendants to perform the said works and to erect the said scaffold in a careful and proper manner, and to take due and proper precautions against injuries happening to persons lawfully passing along and using the said highway. It was then averred, that the defendants did not regard their duty in that behalf, but by themselves and their servants carelessly, negligently, and improperly placed and fixed a large piece of timber upon and across the footpath of the said highway, and kept it there by night, without any light, or other guard, &c., to warn passengers of the same being there, or to prevent them from falling over it; whereby the plaintiff, who was in the night-time lawfully passing along the said highway and the footpath thereof, stumbled over the said piece of timber, and was thereby thrown down and injured.

scaffold, which had become necessary in the building of the bridge; but it was agreed that B. was to provide the requisite materials, and lamps and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected, and owing to that and the want of sufficient light, D. fell over it at night, and was injured. After the accident, B. caused other lights to be placed near the spot, to prevent a recurrence of similar accidents:—*Held*, that an action was not maintainable by D. against B. for the injury thus occasioned.

A Railway Company entered into a contract with A. to construct a portion of their line. A. contracted with B., who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B.'s business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for 40*l.* to erect a

1850.
KNIGHT
v.
FOX.

The defendants pleaded, first, not guilty; and secondly, that they did not, either by themselves or their servants, erect the said scaffold, or fix the said piece of timber; concluding to the country. Upon which pleas issues were joined.

At the trial before *Pollock*, C. B., at the Middlesex Sit-tings after last Trinity Term, it appeared that the Lon-
don and Blackwall Railway Company had entered into
a contract with a person of the name of Brassey, to com-
plete certain works upon a branch line they were in the
process of constructing, and that Brassey had made a sub-
contract with the defendants to erect a portion of the works,
consisting of a tubular bridge across a public highway. The
defendants' works were carried on in the vicinity of Bir-
mingham; but they employed a person of the name of Cock-
rane to conduct their London business at a fixed salary of
250*l.* per annum. It however appeared in the present in-
stance that the defendants had entered into a distinct con-
tract with Cockrane, by which he agreed, for the specific
sum of 40*l.*, to supply the scaffolding required for the bridge,
whilst the defendants were to provide the requisite mate-
rials for its construction, and lights also. In the course of
the construction of this bridge a scaffold was required, and
was erected, and one of the poles used in its formation was
fixed in a sleeper which rested on the pavement of the high-
way. A single light only was placed at night to warn pas-
sengers of this obstacle; the light, however, was not power-
ful enough, but was wholly insufficient for the purpose; and
the plaintiff, in consequence of such want of light and of the
improper projection of the pole of the scaffolding, fell over
the obstacle and broke her leg. Additional lights were
afterwards placed by the defendants near the spot, to guard
against further accidents. Upon this state of facts, it was
objected on the part of the defendants that they were not
liable, but that Cockrane, if any one, was the party who
ought to have been sued. The Lord Chief Baron was of
opinion that there was no evidence upon which the jury

would be justified in finding a verdict for the plaintiff, and directed a nonsuit, with leave to the plaintiff to move to set that nonsuit aside, and to enter a verdict for the plaintiff if the Court should be of a contrary opinion.

1850.
KNIGHT
v.
FOX.

Knowles now moved accordingly.—The case of *Reedie v. London and North Western Railway Company* (a), has settled the law that the owner of *fixed* property, who enters into an engagement with a contractor to execute works upon that property, is not in general liable for injuries occasioned by the negligent acts of the servants of the contractor in the execution of the works. But in the present case there is this difference to be observed—that the contractor was the general servant of the defendants. [*Parke, B.*—But as to this contract, in the management of the erection and fitting up the scaffolding, he was not their servant. It is like the case of a gentleman who enters into a particular and distinct contract with his servant to supply him with job horses.] Here the bridge is the principal thing, while the scaffold is a mere accessory. Suppose a master were to contract with his servant that the latter should purchase his own tools, and the servant, through carelessness, were to place one of them in a dangerous position, so as to cause an injury to a passer-by, the master would surely be liable. [*Alderson, B.*—Suppose this contract had been made with a third person, instead of with Cockrane, there would be no doubt, in such case, that the defendants could not be liable for this accident. Then how does the fact of Cockrane being their general servant or surveyor make any difference?] As Cockrane was the general servant of the defendants, the agreement with respect to the sum of 40*l.* was like advancing him that sum for the purchase of some machine required for the works. Then the additional circumstance of the defendants having paid

(a) 4 Exch. 244.

1850.

Knight
v.
Fox.

for fresh lights to protect the public from similar accidents, was some evidence for the jury of the defendants' liability. [Pollock, C. B.—That might have been a mere act of kindness.] In *Burgess v. Gray (a)*, the defendant, who was occupier of certain premises adjoining a highway, employed a person named Palmer to make a drain therefrom to communicate with a common sewer. In the performance of this work, the workmen employed by Palmer placed a quantity of rubbish on the highway, which occasioned an accident to the plaintiff. The only evidence that the defendant interfered was, that he had applied to the commissioners for leave to break into the sewer; and a policeman said, that, on his calling the defendant's attention to the rubbish, and telling him he must take it away, the defendant said he would remove it as soon as he could; and that, after the accident had happened, the defendant said he could prove that the accident occurred through the plaintiff's own negligence. On these facts, *Tindal*, C. J., left it to the jury to say, whether the defendant wrongfully placed or caused to be placed the rubbish on the highway, and the Court of Common Pleas held this ruling to be correct. *Erle*, J., there said, "Even if the defendant had parted with the whole control to Palmer, I am at a loss to know why he should not be liable *jointly* with Palmer." There is another ground upon which the defendants may be liable to the plaintiff in this action, namely, that the act done amounts to a nuisance. In *Reedie v. London and North Western Railway Company*, with reference to a distinction between fixed real property and personal chattels, which was relied upon on the argument of the case, *Rolfe*, B., in delivering the judgment of the Court, said, "On full consideration, we have come to the conclusion that there is no such distinction, unless, perhaps, in cases where the act complained of is such as to amount to a nuisance." [*Parke*, B.—That means a nuisance as connected with a man's house, or with his fixed property.]

(a) 1 C. B. 578.

1850.
KNIGHT
v.
FOX.

PARKE, B.—I think there ought to be no rule in this case. The act complained of was not an act done by Cockrane in the character of a servant of the defendants. It may be too much even to say that he was their servant in any point of view, for he acted as a contractor or surveyor for them, at a yearly salary of 250*l.*, which he received in lieu of payment for each separate piece of work. Therefore the case, which rests upon the negligence arising out of the construction of the scaffold, is precisely the same as it would have been if the defendants had entered into a contract with some third party to perform that work.

ALDERSON, B.—I am of the same opinion. The real question, and the only one, is, whether the negligent act by which the injury was occasioned to the plaintiff was the act of Cockrane, as the defendants' *servant*; for if it was, they are responsible to the plaintiff for the injury she has sustained. But the evidence shews, that when that negligent act was occasioned by Cockrane, he was acting in the character of a sub-contractor, and that he did the work on his own individual account. The defendants took no part in the matter. The plaintiff's remedy was against Cockrane.

POLLOCK, C. B.—I agree that there ought to be no rule. It may be observed, and it struck me strongly at the trial, that if Brassey, who took the contract from the Company in the first instance, was to be exonerated by his sub-contract with the defendants, they, on their part, had an equal right to say that they had handed over their obligation to Cockrane. With respect to the evidence as to the lights which were placed by the defendants after the accident, this case is distinguishable from *Burgess v. Gray*. There, a single matter—an admission by the defendant—which was unexplained by other testimony, was put to the jury; and possibly, if we knew nothing more of these lights than that the defendants paid for them when they were put up after the acci-

1850.

KNIGHT
v.
FOX.

dent, it might be some slight evidence for the jury of the liability of the defendants. But upon the evidence here, that fact is explained by the circumstances that Cockrane was not to find any of the materials for the bridge, and that he had made a contract that the defendants were to find the materials for it, but that he was to furnish the labour. and was to receive a specific sum for that job; and that this particular contract formed no part of, and had nothing to do with, his general employment by the defendants; and that those lights were so paid for, as forming part of the materials supplied.

Rule refused.

Nov. 12.

PRESCOTT v. HADOW.

A creditor, who has sued a contributory to and shareholder in a Joint-stock Company, and has had his action stayed under the 73rd section of the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, until after the plaintiff shall have made or exhibited proof of his debt or demand before the Master in Chancery, may, upon the allowance of such proof by the Master, and without any further step, proceed with his action.

ROCHFORD CLARKE had obtained a rule to rescind an order made by *Maule, J.*, in this case. It was an action of assumpsit against the defendant, as a contributory to and shareholder in the Royal Bank of Australia. On the 25th of March, after the commencement of the action, an order was made by Vice-Chancellor *Knight Bruce*, under the Joint Stock Companies Winding-up Act (11 & 12 Vict. c. 45) for winding up the affairs of the Company. On the 25th of April an official manager was appointed. On the 15th of June, an order was made by *Alderson, B.*, to stay proceedings until the plaintiff should have "made or exhibited his proof" before the Master in Chancery. On the 17th of June, the plaintiff carried in and exhibited his claim. This was allowed and admitted on the 2nd of July. On the 26th, *Maule, J.*, on summons taken out by the plaintiff, made the order in question, which is as follows: "I order that this cause be tried in its turn, and that the stop order, entered in the Marshal's book and list of causes, be removed, the plaintiff having exhibited his proof to the

Master pursuant to the order of *Alderson*, B., dated the 15th of June."

1860.
 PRESCOTT
 v.
 HADOW.

Bramwell shewed cause.—The question is, whether the plaintiff has rightly pursued the directions of the 73rd section (a) of the Joint Stock Companies Winding-up Act, (11 & 12 Vict. c. 45). By reference to that section, it is perfectly clear that the plaintiff's right to proceed against the contributory of the Company by action is only suspended until "after proof, or exhibiting or making such proof as he may be able, of his debt or demand before the Master as hereinafter mentioned;" and that a judge of the Court in which the action is brought may order "that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master." That is the course which the statute requires, and such a course has been followed in the present case. It was suggested upon the motion for the rule, that the plaintiffs must take some reasonable step to obtain payment of their claim, in addition to the exhibiting it before the Master. But the Act does not require it, and it is difficult to say what steps are to be considered by the Court as reasonable. The object of the enactment is to enable the Master to declare the proper dividend, and to prevent collusion, by requiring persons who have claims against the Company to declare them. This is not analogous to a proceeding in

(a) That section enacts, that "After the first appointment of an official manager, no creditor or other person shall, except so far as the Master shall permit, have power to commence or to proceed with any action against the official manager or against the Company or any other person representing the same, or who is sued as a contributory thereof, until after proof, or exhibiting or mak-

ing such proof as he may be able, of his debt or demand before the Master as hereinbefore mentioned; and it shall be lawful for any judge of the Court in which such action shall be pending, upon summons taken out before him for that purpose, to order that all further proceedings in such action shall be stayed until after such proof shall have been made or exhibited before the Master."

1850.
PRINCEOTT
v.
HADOW.

bankruptcy, where the debtor obtains a certificate which discharges him from his liabilities; but the meaning of the statute is plain and obvious, and points explicitly to a particular mode of proceeding, which has been pursued by the plaintiff.—He was then stopped by the Court.

Rochfort Clarke, in support of the rule.—The words “until after proof made and exhibited,” in the 73rd section, must be construed in such a manner as will carry out the clear and manifest meaning of the Act; and its meaning is to be gathered from the various provisions it contains. Many cases might be cited which support such a rule of construction. Thus, the terms “execution made, had, or levied,” have different meanings, being sometimes applied to the issuing of a writ, sometimes to the delivery of it to the sheriff, and at others to the actual seizure of the goods, or the sale, &c. So the words “goods for exportation” bear different constructions, according to the position they may hold in a statute; and the word “insolvent” may have either a technical or a popular meaning. It is not a sufficient compliance with the statute that the plaintiff should have literally followed the enactment, but he ought also to have taken some reasonable steps to obtain payment of his claim out of the fund mentioned in the Act. It appears by reference to various clauses of the Act, that its object was to point out a mode of winding up the affairs of an insolvent Company, and to provide a fund for the payment of the creditors of the Company, and to protect the contributories to it. The Master has allowed the plaintiff’s claim, and the defendant, as a shareholder, will be liable to contribute to the fund for the payment of the debt; it is therefore unreasonable that he should also be liable in this form of proceeding upon his own personal responsibility. [*Pollock*, C. B.—The plaintiff has a right of action at common law; that right is not to be taken away from him by implication; you now ask us to add a term to what is required by the statute.] The Joint

Stock Companies Act, 7 & 8 Vict. c. 110, is in *pari materia* with the present Act, and requires the creditor to use due diligence to obtain payment of his debt from the Company before he is at liberty to proceed against a shareholder. In *Thompson v. Universal Salvage Company (a)*, Parke, B., said, with reference to this statute, "So long as there is a reasonable prospect of obtaining payment by proving the debt under the provisions of that Act, it is our duty to prevent individual creditors from having execution against the shareholders of the Company," viz. under the 7 & 8 Vict. c. 110, s. 66; and Alderson, B., also said, "It would be very unjust, and not a fair construction of the 7 & 8 Vict. c. 110, that a creditor should proceed against an individual shareholder when he has a right to go against the assets of the whole Company. When he has done so without success, he may again resort to the individual." [*Alderson, B.*—In the case cited, the Court were merely exercising a discretion, which they were empowered to do by the express terms of the statute; in the present case they have no such power given them. The statute merely says, that proceedings are to be stayed until after proof made or exhibited before the Master. How is it possible that we can say that the plaintiff must also take reasonable steps to obtain payment in the mode suggested? How can we say what are to be considered "reasonable steps"?] It is submitted that the case is one for the equitable jurisdiction of this Court, and that they have the power of exercising their discretion under the terms of this Act.

1850.
 PRESCOTT
 v.
 HARROW.

POLLOCK, C. B.—The question is, whether we are to stay proceedings between these parties, the plaintiff having thus far complied with the stat. 11 & 12 Vict. c. 45, that he has made or exhibited proof of his claim before the Master. Now, even if the 58th section had been absent,

(a) 3 Exch. 310.

1850.
PRESCOFF
v.
HADOW.

I should have entertained no doubt whatever on this subject. It is a general rule, which is well established in all cases arising on the construction of statutes, that the common law right of the subject is not to be taken away unless it is very clear, so clear as to leave no doubt, that such is the intention of the legislature. In order, however, to see what this Act of Parliament means, let us look to the 58th section, which enacts, that "except as is by this Act *expressly provided*, nothing in this Act contained, nor any petition or order under the same for the dissolution and winding-up or for the winding-up of any Company, shall extend or enlarge, diminish, prejudice, or in anywise alter or affect the rights or remedies of creditors, or other persons not being contributories of the Company, or the rights or remedies of creditors being also contributories, but being creditors of the Company upon a distinct and independent account, whether against the Company or against any of the contributories of the same; nor the rights or remedies of the Company against any contributories or other persons; nor shall alter or affect any contracts or engagements entered into by or with the Company, or any person acting on behalf of the same, previously to any such petition; nor any actions, suits, or other proceedings pending at the date of such petition." Mr. *Clarke* has, therefore, not merely to satisfy us that what he contends for is reasonable and intended by the statute, but that it is expressly provided by it, and at all events, if not actually expressed, yet so clearly implied that the Court must see it to have been the meaning of the legislature—a conclusion which I should very reluctantly adopt. This 58th section requires not merely that counsel should persuade us that the proceeding for which he argues was intended, but that what was intended is actually expressed. In my judgment it is quite clear that it is not expressed, and I think it was not intended. The rule therefore ought, I think, to be discharged.

PARKE, B.—I agree with my Lord Chief Baron in this case. The question turns upon the true meaning of the 73rd section of this statute, which empowers a judge to stay proceedings upon summons taken out before him for that purpose, until after proof of the debt shall have been “made or exhibited” by a plaintiff before a Master in Chancery. The judge, then, has no power, by this section, to stay proceedings except in the cases of “proof made” or of “proof exhibited.” By the former is meant, until the Master has received and allowed the proof brought before him, and by the latter, until the creditor has given to the Master all such proof as he is able to give of his right to payment as against the Company. In either of these cases the judge has power to interfere; and one of these proceedings must be followed before the creditor is to be permitted to proceed with his action. But after proof made or exhibited, the judge has no power by this Act to stay the proceedings. Then the 58th section says, that the rights of creditors are in no way to be restricted except where it is expressly so provided in the Act; and it is impossible to say that there is any such provision affecting the express rights of the plaintiffs in the present case. The power of the judge is therefore at an end as soon as the Master has allowed the proof thus made or exhibited. The effect of this will be to secure to the Master a means by which he will be enabled to ascertain the number of the Company’s creditors, and also to stay any action which may be brought by any of them until the names of all shall be known. The Master has the power to administer the assets of the Company, and will be enabled to ascertain the amount of calls required to meet the claims against the Company. It appears to me, therefore, that on the words of this enactment the plaintiff creditor has now a right to go on with this action; and I cannot find any clause in this Act of Parliament which induces me to construe those words in any other than their ordinary and natural sense.

1850.
 PRIBOOT
 v.
 HADOW.

1850.
PRESCOTT
v.
HADOW.

The case of *Thompson v. Universal Salvage Company* is quite different from the present. The question there depended upon the 7 & 8 Vict. c. 110. The plaintiff there had obtained a verdict and judgment against a joint-stock Company within that statute; and on his applying, under the 68th section, to have execution against a member without suggestion or scire facias, he was obliged to satisfy the Court that he had had recourse to all proper means to obtain satisfaction for his debt from the assets of the Company, by making or exhibiting proof of it before the Master under the 11 & 12 Vict. c. 45. That was our construction of that section of that statute. Under the present statute an action can only be stayed by virtue of the 73rd section, which only gives a limited power to a judge to do so in one of two events, either of proof made or of proof exhibited; or, in other words, until the plaintiff has sought to obtain payment of his debt by doing all he could to satisfy the Master of its existence.

ALDERSON, B.—I am of the same opinion, with one exception. I quite agree that the 73rd section must be construed according to the plain meaning of its language, but I doubt whether allowance of proof by the Master in Chancery is at all essential to its operation. And my reason for that opinion is, that the section says, the proceedings are to be stayed until after proof of the plaintiff's debt or demand shall have been "made or exhibited before the Master;" the 74th section says, that the proof of the debts or demands of creditors or companies shall be made before the Master "by deposition or affidavit;" and the 75th section says, "that the Master shall, *upon proof made or offered or exhibited* before him, of the debts and demands due or claimed from or against the Company, or any of them, either *allow or disallow, or allow as claims only*, such debts and demands respectively, according to the nature of the case, and of the proofs adduced or exhibited before him, and shall

by writing under his hand declare such allowance and disallowance, or such allowance as claims only." Proof therefore must have been made before allowance. Upon my construction of the words "proof made or exhibited," their meaning is, that proof "made" is to be taken to mean, that the deposition shall have been laid before the Master, together with everything necessary to complete the proof, and proof "exhibited," a tender of that which is to be afterwards completed by deposition. All that, however, makes no difference as to this rule, because here both the proof has been offered, and allowance of it made. The Judge has therefore no power whatever to stay the proceedings beyond that limited time, and that time having elapsed, his power is also at an end. It would be a direct interference with the 58th section, if we were now to stay proceedings; for the 73rd section says, that they shall only be stayed for a limited time; and the 58th section says that, except as expressly provided by the Act, the rights of a creditor shall not be affected thereby.

1850.
 PRISCOTT
 v.
 HADOW.

PLATT, B.—I quite concur in the opinion expressed by my Brother *Parke*, except so far as regards the qualification which my Brother *Alderson* has made, as I think any act of the Master is unnecessary in such a case. The only act required is that of making or exhibiting proof. The 74th section points out how that is to be done; and upon that being done, then the stay of proceedings is at an end. With regard to *Thompson v. Universal Salvage Company*, it may be observed, that that case is not confined to insolvent companies, and would have been decided in the same way if the Company there had been solvent; for the return of *nulla bona* made to the *fieri facias* against the Company would not have sufficed to induce us to issue execution against other parties; it was necessary that the Court should be satisfied that there had been a *bonâ fide* execution and attempt to recover against the funds of the Com-

1850.
 PRESCOTT
 v.
 HADOW.

pany. The present case, however, depends entirely on the words of the 73rd section of the 11 & 12 Vict. c. 45, which are as plain as language can make them.

Rule discharged.

Nov. 7.

BRANDFORD v. FREEMAN.

An incorrect ruling at Nisi Prius, as to the proper party to begin, is no ground for a new trial, unless it also appears that substantial injustice has resulted from it.

ASSUMPSIT.—The first and second counts were by the plaintiff, as accommodation acceptor of two bills of exchange for 200*l.* each, against the defendant, for whose use the plaintiff had accepted them, for not indemnifying him. The last count was a count in 400*l.* for money paid by the plaintiff for the defendant's use. The defendant pleaded, that the sum of 400*l.* in the last count constituted one and the same debt as the two sums of 200*l.* mentioned in the first and second counts; and that the defendant entered into a composition deed with the plaintiff and his other creditors, whereby they covenanted not to sue him for any debts then due to them; and that the plaintiff, after the payment of the bills of exchange by him, had executed the said deed.—Verification. Replication, that the said deed was executed by the plaintiff before the said bills were paid by him, and not afterwards; concluding to the country. Issue thereon.

At the trial of the cause, before *Alderson*, B., at the last Norfolk Assizes, the plaintiff's counsel insisted that the issue lay upon the defendant, and that therefore he was bound to begin, and to prove the issue. The learned Judge was of that opinion, and ruled accordingly; whereupon the defendant's counsel called a witness, who proved that the deed was executed after the first bill of exchange had become due and payable, but at that time the other bill had not arrived at maturity. The plaintiff accordingly obtained a verdict for the sum of 200*l.*

Couch now moved for a new trial, on the ground that the

learned Judge was wrong in ruling that the defendant was bound to begin. The plaintiff ought to have begun, as the onus of proof lay upon him. The time when the bills were paid by him was a fact peculiarly within his own knowledge, and he was bound to shew, in the first instance, that the money was paid. [*Parke, B.*—It was held by this Court, in the case of *Edwards v. Matthews* (a), in the year 1847, that the mere fact that the wrong party has begun is no ground for a new trial; but that, in order to obtain the interposition of the Court, it must appear that some injustice has resulted.] In the more recent case of *Doe d. Bather v. Brayne* (b), the Court of Common Pleas do not appear to have acted upon that rule. That was an action of ejectment by a devisee, and the defendant at the trial offered to admit the due execution of the will under which the plaintiff claimed the property, and that the plaintiff thereby would establish a *prima facie* case; but that he, the defendant, in support of his case, relied upon a will made by the testator at a subsequent period; and the learned Judge by whom the cause was tried ruled that the defendant, upon such an admission, was entitled to begin; but the Court held this ruling to be incorrect, and granted a new trial. [*Pollock, C. B.*—The Court might very properly think in that case that justice was not fully effected, as the right to begin might be a matter of the greatest importance.] The onus here was thrown upon the wrong party, which is a sufficient ground for this application. [*Alderson, B.*—When I ruled that the defendant was bound to begin, ought not his counsel to have stood upon his right, by refusing to give any evidence? and then, if I had put the wrong question to the jury, or had told them that, in the absence of any evidence, the plaintiff was entitled to the verdict, and I had been wrong in so ruling, the defendant might have obtained a new trial on the ground of misdirection; but, instead of adopting such a course, the defendant's counsel called evidence, which failed to establish his case.]

1850.
BRANDFORD
v.
FREEMAN.

(a) 11 Jur. 398.

(b) 5 C. B. 655.

1850.
BRANDFORD
v.
FREEMAN.

POLLOCK, C. B.—I adhere to the decision of this Court in *Edwards v. Matthews*, in which case time was taken for the purpose of deliberation before judgment was given. I observe that I there said, in delivering the judgment of the Court, “It appears that the rule adopted in this Court is this,—that the plaintiff or defendant having been called on to begin, when proof of the issue lay on his adversary, is not a sufficient ground for a new trial, unless it is manifest that the course of justice has been thereby interfered with, and some substantial injury effected at the trial of the cause.” And I then added, that at one time I had an impression “that a miscarriage as to who should begin was so important a matter, and might, in many instances, interfere so much with the course of justice, that we ought always to interfere and correct it; but, on referring to the judgment of the Court in the cases to which I have alluded, we must now take it as settled, that the question, whether any injury has been done by the erroneous ruling of the judge at *Nisi Prius*, is involved in the question of the propriety of granting a new trial for it. In the present case, there has been no injury done. The trial was an issue directed for the purpose of informing the conscience of the Court, and on looking at all the evidence, we think that the verdict was right, and consequently ought not to be disturbed.” So, in the present case, I think no injury has been done, as it is clear from the testimony of the defendant’s witness, that the result must have been the same, however the Judge had ruled on the point.

PARKE, B.—I am of the same opinion. This Court has settled, that when there has been a mere error with respect to the order of beginning, as deduced from the pleadings, no new trial ought to be granted; but that it is otherwise if the error has led to substantial injustice. One of the first cases on this subject was *Huckman v. Fernie* (a), where

(a) 3 M. & W. 505.

Lord *Abinger*, C.B., is reported to have said: "I cannot say that we should interfere in a very doubtful case; but if the decision of the Judge *were clearly and manifestly wrong*, the Court would interfere to set it right." Now that is an inaccuracy, and I have corrected it in my own hand in the copy of *Meeson & Welsby* which is in this Court. What Lord *Abinger* said was, that the order of beginning is a matter for the disposal of the Judge at *Nisi Prius*; but if his ruling "did clear and manifest wrong," the Court would interfere to set it right; and that view of his language is confirmed by the note appended to the report of *Edwards v. Matthews*, in the *Jurist*. By that rule I am prepared to abide, for it would be an extreme hardship to grant a new trial on such a ground alone, where substantial justice has been done between the parties. Admitting, therefore, for the sake of argument, that my Brother *Alderson* was wrong in this case, in holding that the burthen of proof lay in the first instance on the defendant (which, however, I by no means admit, and indeed I think he was right, although I do not pronounce a positive opinion upon that point); still, upon the examination of the witness, it is perfectly clear what the result of the case would have been, had the ruling of my learned Brother been that for which the defendant's counsel contended.

1850.
BRANDFORD
v.
FREEMAN.

ALDERSON, B.—I agree with the other members of the Court in the rule which they have laid down, and still think that I was correct in holding, at the trial, that the defendant was the party who was bound to begin.

Rule refused (a).

(a) In *Cannam v. Farmer*, 3 Exch. 700, *Rolfe*, B., said:—"The Court never grant a rule for a new trial on the ground that the wrong

party had begun, unless also some injustice has arisen from that circumstance."

1850.

Nov. 9.

NURDIN v. FAIRBANKS.

In an action of debt brought in the superior Court, to recover the sum of 9*l.* 10*s.*, the defendant pleaded, except as to 8*l.* 14*s.*, never indebted, and as to that sum tender before action, and payment of that amount into Court. A verdict having been found for the plaintiff for 16*s.*, the Court refused to stay the proceedings upon payment of the debt, without costs, on the ground that the action was frivolous, as brought to recover a sum less than 40*s.*

JOYCE moved for a rule calling upon the plaintiff to shew cause why all proceedings in this action should not be stayed on payment of the debt *without costs*, on the ground of the action being frivolous; or why the defendant should not be at liberty to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95.

It was an action of debt brought to recover the sum of 9*l.* 10*s.* The defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to that sum so excepted, tender before action, and payment of that amount into Court. The plaintiff joined issue upon the first plea, and traversed the last, and issue was joined thereon. The cause was tried before the Secondary, and the plaintiff obtained a verdict upon the first issue, with 16*s.* damages, and upon the other issue the defendant had the verdict.—There are two grounds for this motion. In the first place, the defendant is clearly entitled to enter a suggestion under the 9 & 10 Vict. c. 95; and secondly, the action is frivolous, and ought not to have been brought in the Superior Court, as the amount which the plaintiff substantially sought to recover in it is less than 40*s.* The jury have found that the tender was made before action brought; it is in effect, therefore, a payment before action, and the whole amount of the plaintiff's claim was under 40*s.*, the substantial claim being for 16*s.* only. [*Parke, B.*—Upon the first point you are entitled to a rule, but clearly not upon the second. The object of the Courts in staying actions for sums under 40*s.* is to prevent frivolous actions from being brought, where the amount recovered would not justify the costs to be incurred; but suppose an action for 100*l.* were brought, and the amount found to be due were to be reduced by tender or payment below the sum of 40*s.*,

how could it be said that the action was frivolous ?] The effect of the finding of the jury is, that the plaintiff ought to have accepted the amount tendered. [*Alderson*, B.—An action is not frivolous which is brought to try the question of a tender; but where a man brings an action to recover 40*s.* only, the thing to be tried is frivolous upon the face of it.] *Stutton v. Bament* (a) seems to be an authority for the defendant's position. [*Parke*, B.—The present action was not brought to recover a sum of less amount than 40*s.*, but in reality of much greater amount. When the plaintiff sued out his writ, he might not be aware that the defendant would plead a tender and pay the amount into Court. *Pollock*, C. B.—It appears to me that if the defendant's argument be true, in every case where the amount is reduced by a good defence below the sum of 40*s.* the defendant would be entitled to succeed upon an application of this nature.]

POLLOCK, C. B.—We are all clearly of opinion that upon this point there ought not to be a rule. Upon the other point the defendant may take a rule.

PARKE, B., and ALDERSON, B., concurred.

Rule accordingly.

(a) 3 Exch. 831.

1850.
NURDIE
v.
FAIRBANKS.

1850.

Nov. 9.

NURDIN v. FAIRBANKS.

In an action of debt brought in the superior Court, to recover the sum of 9*l.* 10*s.*, the defendant pleaded, except as to 8*l.* 14*s.*, never indebted, and as to that sum tender before action, and payment of that amount into Court. A verdict having been found for the plaintiff for 16*s.*, the Court refused to stay the proceedings upon payment of the debt, without costs, on the ground that the action was frivolous, as brought to recover a sum less than 40*s.*

JOYCE moved for a rule calling upon the plaintiff to shew cause why all proceedings in this action should not be stayed on payment of the debt *without costs*, on the ground of the action being frivolous; or why the defendant should not be at liberty to enter a suggestion to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95.

It was an action of debt brought to recover the sum of 9*l.* 10*s.* The defendants pleaded, except as to 8*l.* 14*s.*, never indebted, and as to that sum so excepted, tender before action, and payment of that amount into Court. The plaintiff joined issue upon the first plea, and traversed the last, and issue was joined thereon. The cause was tried before the Secondary, and the plaintiff obtained a verdict upon the first issue, with 16*s.* damages, and upon the other issue the defendant had the verdict.—There are two grounds for this motion. In the first place, the defendant is clearly entitled to enter a suggestion under the 9 & 10 Vict. c. 95; and secondly, the action is frivolous, and ought not to have been brought in the Superior Court, as the amount which the plaintiff substantially sought to recover in it is less than 40*s.* The jury have found that the tender was made before action brought; it is in effect, therefore, a payment before action, and the whole amount of the plaintiff's claim was under 40*s.*, the substantial claim being for 16*s.* only. [*Parke, B.*—Upon the first point you are entitled to a rule, but clearly not upon the second. The object of the Courts in staying actions for sums under 40*s.* is to prevent frivolous actions from being brought, where the amount recovered would not justify the costs to be incurred; but suppose an action for 100*l.* were brought, and the amount found to be due were to be reduced by tender or payment below the sum of 40*s.*,

1850.
 NURDIN
 v.
 FAIRBANKS.

how could it be said that the action was frivolous?] The effect of the finding of the jury is, that the plaintiff ought to have accepted the amount tendered. [*Alderson*, B.—An action is not frivolous which is brought to try the question of a tender; but where a man brings an action to recover 40*s.* only, the thing to be tried is frivolous upon the face of it.] *Stutton v. Bament* (*a*) seems to be an authority for the defendant's position. [*Parke*, B.—The present action was not brought to recover a sum of less amount than 40*s.*, but in reality of much greater amount. When the plaintiff sued out his writ, he might not be aware that the defendant would plead a tender and pay the amount into Court. *Pollock*, C. B.—It appears to me that if the defendant's argument be true, in every case where the amount is reduced by a good defence below the sum of 40*s.* the defendant would be entitled to succeed upon an application of this nature.]

POLLOCK, C. B.—We are all clearly of opinion that upon this point there ought not to be a rule. Upon the other point the defendant may take a rule.

PARKE, B., and ALDERSON, B., concurred.

Rule accordingly.

(*a*) 3 Exch. 831.

1850.

Nov. 19.

On the application of an attorney to be allowed to substitute the name of J. Heaton D. on the roll of attornies, in the place of J. D., this Court refused to alter the roll, but directed the Master to make a memorandum on the roll opposite the party's name, stating that he was now known by the name of J. Heaton D., and that the memorandum was made by rule of Court.

In re DEARDEN, Gent., one &c.

ATHERTON moved for a rule, directing the Master to substitute the name of Josiah Heaton Dearden, on the roll of attornies of this Court, in the place of Josiah Dearden; and that the Master be at liberty to make an indorsement of such alteration of name on the admission of the applicant.

The affidavit in support of the motion stated, that the application was made in consequence of Mr. Dearden having adopted the name of Heaton, which was the name of a near relation, from whom he had received certain property. —This application is made to avoid the expense which the party would incur by appearing to sign his name again upon the roll of attornies; and he, therefore, applies for a similar rule to that which has already been granted by the other Courts. [*Alderson*, B.—The Master cannot sign the attorney's name. *Pollock*, C. B.—The proper course will be, not to alter the name on the roll, but to make a memorandum in the margin of the roll opposite the party's name, stating that the within Josiah Dearden is now known by the name of Josiah Heaton Dearden; and that such memorandum is ordered by rule of Court.]

PER CURIAM (a)—

Rule accordingly (b).

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

(b) The rule in the Court of Queen's Bench was as follows:—"It is ordered, that the name of the said Josiah Dearden, on the roll of attornies of this Court, be altered, by inserting the name of Heaton after that of Josiah, so that the name of Josiah Heaton Dearden stand on the roll of attornies instead of that of Josiah Dearden; and that the Master be at liberty to make an indorsement

of such alteration on the admission of the said Josiah Dearden: on the motion of Mr. *Atherton*." The rule in the Common Pleas was as follows:—"It is ordered, that the Masters be at liberty to amend the roll of attornies of this Court by altering the name of Josiah Dearden to Josiah Heaton Dearden; and that the said Masters be at liberty to make an indorsement on his admission in this Court accordingly."

1850.

**DERRY, Public Officer of THE DEVONSHIRE AND CORNWALL
BANKING COMPANY, v. TOLL**

Nov. 4.

DEBT by the plaintiff, as public officer of the Devonshire and Cornwall Banking Company.—The declaration contained counts for work and labour, commission, money lent, money paid, and interest.

Fourth plea.—As to 390*l.* 13*s.* parcel, &c., that before the accruing of the causes of action, &c., to wit, on &c., it was corruptly, and against the form of the statute in such case made and provided, agreed by and between the defendant and the said co-partnership, that the said co-partnership should then and thenceforth, and from time to time, as the defendant should require, lend to him certain sums of money, of such amount respectively as he should require, but so that all the sums of money so to be lent by them to the defendant should not, in the whole, exceed 1000*l.*, by paying out of their own monies, and over and above such monies of the defendant as they might hold, to such persons as should be the lawful holders of, and should present to them for payment, cheques signed by the defendant, so as that the amount of the said cheques so to be paid out of their proper monies should not exceed the sum of 1000*l.*, upon certain terms, viz. that the said co-partnership should forbear to give to the defendant day and time for the repayment of all the said sums, to wit, until the said co-partnership should demand such repayment; and that, for and in respect of such forbearance, the defendant should pay to them certain

To a declaration for work and labour, commission, money lent, and interest, the defendant pleaded, that it was corruptly, and against the form of the statute, agreed between the plaintiff and the defendant, that the plaintiff should, from time to time, as the defendant should require, lend him sums not exceeding 1000*l.*, by cashing the defendant's cheques; and that, for the forbearance, the defendant should pay the plaintiff certain sums, partly under the name of interest, and partly under the shift and cheivance of commission, at the rate of 10*l.* per cent. The plea then averred, that the plaintiff did cash the

defendant's cheques, and that the usurious interest was so charged:—*Held*, on special demurrer, that the plea was good, although it did not state how much of the excess beyond 5*l.* per cent. was for usurious interest, and how much for commission, it appearing that the agreement for the gross sum to be paid for interest and commission was done colourably, so as to enable the plaintiff to get more than 5*l.* per cent.

In pleading usury, the defendant need only bring the transaction within the 12 Anne, stat. 2, c. 16; and if the plaintiff relies upon the 2 & 3 Vict. c. 37, as exempting the case from the operation of the statute of Anne, that should come by way of replication.

1850.

DERRY
v.
TOLL.

interest and sums of money to be charged by them to him, partly under the name of interest, and partly under the name, shift, and chevisance of commission, which should be charged to the defendant by the said co-partnership in respect of, and as the pretended price, value, and remuneration of and for, certain work that might or should be thereafter done by the said co-partnership for the defendant, at a rate altogether exceeding the rate of 5*l.* for the forbearance of every 100*l.* for a year, to wit, at the rate of 10*l.* for the forbearance of every 100*l.* for a year. That afterwards, and under and according to the said corrupt and unlawful agreement, and at divers times after the making thereof, until and at the commencement of this suit, and the accruing of the causes of action, &c., the said co-partnership did lend, in manner aforesaid, to the defendant, such sums as amounted to a certain sum not exceeding 1000*l.*, to wit, the sum of 300*l.*, and that they did charge to him such illegal and excessive interest as and in the manner aforesaid, partly under the name of interest, and partly under the name, shift, and chevisance of commission as aforesaid, upon the said sum so lent and advanced to him; that is to say, interest at the rate of 10*l.* for the forbearance of every 100*l.* for a year, and upon sums so advanced and lent as aforesaid, from the respective times when the same were so lent, until and at the commencement of this suit. Averment, that the sums so paid in cashing the defendant's cheques are the monies sought to be recovered as money paid and lent; and that the sums sought to be recovered for work and labour, are so charged for the commission stipulated for in the said agreement; and that the interest sought to be recovered is the said excessive interest.

The fifth plea was similar to the fourth, except that it was pleaded only to the commission and interest, and alleged that there was an agreement between the co-partnership and the defendant for interest at 15*l.* per cent., as

consisting of 5*l.* per cent. for interest, and 10*l.* per cent. which was to be charged under colour of commission.

Special demurrers, and joinders therein.

1850.
DERRY
v.
TOLL.

Taprell argued in support of the demurrers in last Trinity Term (May 27)—The first objection to the fourth plea is, that it does not state how much of the 300*l.* was for money lent, how much for interest, and how much for commission. Again, no specific sum is stated to have been charged for interest. In 1 Wma. Saund. 295 a, note (1), it is said, "There is, however, a distinction taken between actions or informations on the statute, and pleas in bar: in the latter it is necessary to set forth the whole matter specially, because it is within the defendant's own knowledge; but in the former it is sufficient to set forth the corrupt contract generally, because an action or information may be brought by a stranger. 1 Hawk. P. C. 248, s. 24, fol. ed." Also, in the same work, at p. 295 b, "So the defendant must set forth the usurious agreement specially, and how much more than legal interest was agreed to be given." The same distinction is noticed in Bac. Abr. tit. "Usury" (K), where it is said "In pleading a usurious contract by way of bar to an action, you must set forth the whole matter especially, because it lay within your own privity; but in an information on the statute for making such a contract it is sufficient to set forth the corrupt bargain generally, because matters of this kind are supposed to be privily transacted, and such information may be brought by a stranger." In *Hill v. Montagu* (a), a general plea of usury was held bad on special demurrer. Lord *Ellenborough*, C. J., there said, "The corrupt contract ought to be particularly set forth, and the usurious interest, that the party may know what to answer. The party against whom it is pleaded may be aware of the con-

(a) 2 M. & Selw. 377.

1850.

DERRY
v.
TOLL.

tract, but he cannot know in what particulars it is meant to be assailed, or wherein the other side imputes vice to it." And in *Robson v. Fallows* (a), *Tindal*, C. J., says, "Generally speaking, a plea of usury must state the precise terms of the contract; because the Court should see on the face of the record whether more than 5*l.* per cent. has been obtained for the forbearance of a sum for a given time." The pleas ought to have distinguished how much was charged for interest, and how much for commission, as particularity is required in order to bring the case within the principle as stated in *Bac. Abr.* tit. "Usury" (C). "But a contract reserving to the lender a greater advantage than is allowed by the statute is equally within the meaning of it, whether the whole be reserved by way of interest, or in part under that name and in part by way of rent for a house, let at a rate plainly exceeding the known value." Here the plea only shews that more than 5*l.* per cent. was taken for commission and interest jointly. In *Downes v. Green* (b), Lord *Abinger*, C. B., said, that the Court cannot presume that an agreement was corruptly or unlawfully made. *Bedo v. Sanderson* (c) was there cited in argument, upon which *Parke*, B., remarked, that "that was the case of an information under a statute, in which the same particularity is not required as in a plea." Further, it is not sufficiently alleged that the loans were made and the interest paid in pursuance of the alleged usurious contract; and the periods for which the advances were to be forborne should have been stated distinctly and positively, and not, as here, left to mere inference. In *Partridge* q. t. v. *Coates* (d), *Abbott*, C. J., ruled that the day on which the money was lent was material, though laid under a *videlicet*; and that it must appear on the face of the record that the period of forbearance is such that the interest taken is more than the party is by law allowed to receive. So in *Fox* q. t. v.

(a) 3 Bing. N. C. 392.

(c) Cro. Jac. 440.

(b) 12 M. & W. 481.

(d) Ry. & M. 153; 1 C. & P. 543.

Keeling (a), Lord Denman, C. J., said "It is clear from the authorities that time is of the essence of all usurious bargains; and that, in a declaration alleging such a bargain, the date of the usurious contract must be stated, and must be proved as laid, even though under a videlicet." Those were *qui tam* actions, and the principle would apply a fortiori to a plea. Further, the performance of the alleged usurious contract is insufficiently stated. The plea should have shewn the amount of the cheques, and that they were presented by the lawful holders. If this were a valid agreement, and an action had been brought upon it, a plea of performance in terms like the present would have been insufficient. In general, whatever is alleged in pleading must be alleged with certainty: Stephen on Pleading, ch. 2, sect. 4, rule 7; Com. Dig. "Pleader" (C 58), (C 59), (C 60). The plea is also bad, because it does not shew that the contract is not excepted from the operation of the 12 Anne, stat. 2, c. 16, by the 2 & 3 Vict. c. 37. The Court will not presume illegality; on the contrary, the presumption is in favour of the legality of the contract: *Lewis v. Davison* (b). *Thibault* q. t. v. *Gibson* (c) was an action for penalties, and whether or no the contract was usurious was matter of evidence open under the general issue. In *Turquand v. Mosedon* (d) it was held, that the averment of the contract being "against the form of the statute" was not a sufficient allegation that it was illegal; and that a replication setting up a usurious contract was bad, for not alleging either that the contract was made before the 7 Will. 4 & 1 Vict. c. 80, and 2 & 3 Vict. c. 37 came into operation, or that it was excepted from the provisions of those Acts. *Washbourn v. Burrows* (e) may be supported, on the ground that *prima facie* the security

1850.
DERRY
v.
TOLL.

(a) 2 A. & E. 670.

(d) 7 M. & W. 504.

(b) 4 M. & W. 654.

(e) 1 Exch. 107

(c) 2 M. & W. 88.

1850.

DERRY

v.

TOLL.

comprised an interest in land. The objections to the fifth plea are substantially the same.—He also cited *Holt v. Miers* (a).

Bovill contra.—The contract is stated with sufficient certainty, for it is shewn that the agreement was illegal, as a mere shift and contrivance to evade the usury law, which was not done in *Downes v. Green* (b). With respect to the objection that the plea does not distinguish how much was paid for interest and how much for commission, it is impossible to do so if the parties do not agree to distinguish them. Indeed, their very object is so to shape the contract that the usury may be concealed. The times and amounts need not be specified, for the advances are stated to have been made according to the contract, which is a matter within the plaintiff's knowledge. [The Court intimated an opinion that the contract was stated with sufficient certainty.] Then, as to the other point, it is enough to shew that the contract was illegal within the statute of Anne. In *Turquand v. Mosedon*, no reasons are given for the judgment. In *Thibault v. Gibson*, the present objection was distinctly raised, and the Court decided on the broad principle, that where a statute creating a penalty contains an exception in the enacting clause, the plaintiff must shew that the defendant is not within the exception; but where the exemption comes by way of proviso, either in a subsequent section or a subsequent statute, it is matter of defence, and must be pleaded. That principle was recognised and adopted in *Washbourn v. Burrows*.

Cur. adv. vult

The judgment of the Court was now delivered by

POLLOCK, C. B.—This was an action for work and labour,

(a) 5 M. & W. 168.

(b) 12 M. & W. 481.

commission, money lent, money paid, interest, and on an account stated.

To this declaration the defendant pleaded several pleas. By the fourth plea he sets up an agreement by the co-partnership represented by the plaintiff, that they should cash the defendant's cheques to any amount not exceeding 1000*l.*; and that, in consideration of their so doing, the defendant should pay them interest at a rate exceeding 5*l.* per cent. per annum, *i. e.* 10*l.* per cent., partly under the name of commission and partly under the name of interest. The plea then avers, that the co-partnership did cash the defendant's cheques, and did charge him such excessive interest; and that the sums so paid in cashing the defendant's cheques are the moneys sought to be recovered as money paid and lent; and that the sums sought to be recovered for work and labour are so charged for the commission stipulated for in the said agreement; and the interest sought to be recovered is the said excessive interest.

The fifth plea is substantially the same, except that it is pleaded only to so much of the plaintiff's demand as relates to interest and commission, and states the agreement to have been a corrupt agreement for interest at 15*l.* per cent., *i. e.* 5*l.* per cent. under the name of interest, and 10*l.* per cent. under colour of being charged for commission. To these pleas there are special demurrers.

Mr. *Taprell* contended, for the plaintiff, that the agreement was not set out with sufficient certainty; that it ought to have been shewn how much precisely of the excess beyond 5*l.* per cent. was for usurious interest, and how much for commission; but, as we intimated at the hearing, the answer to this is, that the contract is stated with all the certainty of which it is capable. When parties enter into an usurious contract of this nature, it is studiously done in such a manner as to mix up the interest and commission in one charge, so as to make it im-

1850.

DERRY
v.
TOLL.

1850.

DERRY

v.

TOLL.

possible to tell how much is attributable to the one head and how much to the other. The defendant has shewn exactly what the bargain was, and has stated that the agreement for the gross sum to be paid for interest and commission was done colourably, so as to enable the partnership to get more than 5*l*. per cent. This we think is all which the defendant could be called on to do.

But the main point relied on by the plaintiff was, that the plea was bad for not having stated either that the contract was entered into previously to the 2 & 3 Vict. c. 37, or, if subsequently, that it related to land. But this objection cannot be sustained. The case is governed by *Washbourn v. Burrows* (a). It was there decided that a party setting up usury as a defence need only state enough to bring the case within the operation of the statute of Anne; and that is certainly done here. That statute is still in force, and if the opposite party means to contend that the case is one which is taken out of the operation of the statute of Anne by the statute of Victoria, the burthen is on him to do so. This is the clear result of our decision in *Washbourn v. Burrows*, which governs this case; and the judgment must, therefore, be for the defendant.

Judgment for the defendant.

(a) 1 Exch. 107.

1850.

LYONS v. HYMAN.

Nov. 4.

THIS was a rule calling on the plaintiff to shew cause why the judgment signed herein, the taxation of costs, and execution, should not be set aside, or why the judgment should not be amended by striking out of it so much as related to the costs, or why all further proceedings should not be stayed on payment of 1s.

The action was in debt to recover 97*l.* 10*s.* alleged to be due for wages, and was tried before the Lord Chief Baron on the 11th May last, when the jury found a verdict for the plaintiff, damages 1*s.* On the 29th May the plaintiff's attorney delivered to the defendant's attorney his bill of costs, with an appointment to tax on the following day. On the morning of the 30th judgment was signed, but no sum was inserted as the amount of costs, a blank being left for it. At a later hour on the same day the costs were taxed, the defendant's attorney attending under protest; and at half-past three o'clock in the afternoon of that day the plaintiff's attorney caused the judgment to be completed by inserting the amount of costs, and issued execution. At a later period of the day the defendant served a summons, returnable on the following morning before the Lord Chief Baron, calling on the plaintiff to shew cause why the learned judge should not indorse a certificate on the *postea* under the 43rd Eliz. c. 6, s. 2, in order to deprive the plaintiff of costs. The parties attended accordingly, when the Lord Chief Baron certified under the statute, and ordered the judgment, taxation, and all subsequent proceedings to be set aside, and the certificate to be indorsed as of the 30th May. On application to the Lord Chief Baron, on the 5th June, he ordered that the judgment be restored as it was at the time execution issued on the 30th May.

A certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, granted after judgment and execution, is wholly inoperative; but the Court will, nevertheless, under particular circumstances, give effect to it by setting aside the judgment and execution.

Watson and *Hawkins* shewed cause.—The certificate,

1850.

LYONS

v.

HYMAN.

having been given after judgment and execution, was wholly inoperative. The words of the 43 Eliz. c. 6, s. 2, are—"If it shall appear to the judges of the same Court, and so signified by the justices before whom the same shall be tried, that the debt or damages do not amount to 40s., then the judges *shall not award* for costs to the party plaintiff a greater sum than the debt or damage recovered." In *Whalley v. Williamson* (a) the Court said, that, assuming a judge might revoke his certificate, he must do so within a reasonable time. The object of the certificate is to inform the Court above what judgment they ought to pronounce; but that can be of no avail if the Court have already given judgment. In *Hippesley v. Layng* (b) the Court expressed an opinion, that an application for a suggestion to deprive the plaintiff of costs under a Court of Requests Act must be made promptly. *Foxall v. Banks* (c) will probably be cited as an authority, that a certificate to deprive a plaintiff of costs may be indorsed on the postea after the costs have been taxed, and although the defendant's attorney was present and did not object to such taxation. But there, the judge at the trial intimated his intention of considering whether he would certify or not; and when the parties afterwards attended before him on a summons to indorse the certificate, he expressed his intention to certify, but the plaintiff's attorney refused to produce the postea. Also in *Davis v. Cole* (d), where the certificate was granted after judgment and taxation, the judge at the trial expressed his intention of certifying, but the officer omitted to indorse the postea.

Bramwell and *Lush* in support of the rule.—The certificate having been indorsed as of the 30th May, and the

(a) 5 Bing. N. C. 200.

(b) 4 B. & C. 863.

(c) 5 B. & Ald. 536.

(d) 6 M. & W. 624.

judgment paper not having been then filled up, there was no complete judgment until after the certificate was granted. [*Parke*, B.—In the cases cited, where certificates were given after judgment, there was no irregularity, because an application was made to the judge at the proper time. Here no certificate was applied for until after judgment signed and execution issued, so that the judgment is regular and not contrary to good faith. *Pollock*, C. B.—The judge's power to certify expires when judgment is obtained.] At all events, the Court have power to set aside the judgment on terms.

1850.
LYONS
v.
HYMAN.

PER CURIAM (*a*).—The rule will be absolute to set aside the judgment, on payment of all costs subsequent to the notice of taxation.

Rule accordingly.

(*a*) *Pollock*, C. B., *Parke*, B., *Alderson*, B.

1850.

Nov. 4.

WILSON v. EDEN.

A testator, by will made in 1815, after giving certain legacies, bequeathed "all the rest, residue, and remainder of his personal estate, goods, and chattels, whatsoever and wheresoever," subject to the payment of his debts and legacies, to D. "absolutely, to and for his own use and benefit." The testator further devised "all and singular his manors, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, in the county of Durham, and *"all other his real estate"* in the said county, "and all his estate and interest

BY order of the Master of the Rolls, the following case was stated for the opinion of this Court:—

Sir Robert Johnson Eden, late of Windlestone, in the county of Durham, Bart., duly made and published his will, dated the 14th of April, A.D. 1815; and after directing the payment of all his debts, funeral and testamentary expenses, and after giving certain annuities (with the payment of which he charged his real estates), and after giving certain legacies, he thereby gave and bequeathed as follows:—"I give and bequeath all the rest, residue, and remainder of my personal estate, goods, and chattels, whatsoever and wheresoever, after and subject to the payment of my just debts, funeral and testamentary expenses, and the said legacies and bequests (except the said annuities) hereinbefore by me given as aforesaid, and all my estate and interest therein, unto my brother, Morton John Davison, Esq., late Morton John Eden, absolutely, to and for his own use and benefit." And the said testator gave and devised as follows:—"I give and devise all and singular my manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, and being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Brignal, in the county of York, and a parcel of land purchased by me of the late Mrs. Mary Lambton, at Ro-

therein, to trustees, to the use of D. for life, and, after his decease, to the use of the first and other sons of D. in tail male." D. died in the lifetime of the testator, who, in 1841, made a codicil, whereby he appointed another executor, and ratified, confirmed, and re-published his will. The testator, at the time of his death, was possessed of both freehold and leasehold estates in the county of Durham:—*Held*, that the will, having been re-published by the codicil, must, according to the provisions of the 34th section of 1 Vict. c. 26, be deemed to have been made at that date; and therefore, by virtue of the 26th section, the leaseholds passed to the trustees under the general devise of the real estate, no contrary intention appearing on the face of the will.

1850.

WILSON
v.
EDEN.

manby, near North Allerton, in the North Riding of the county of York, and all other my real estates in the said counties of Durham and York, and elsewhere in Great Britain, and all my estate and interest therein, unto Robert Eden Duncombe Shafto, of Whitworth, in the county of Durham, Esq., William Nesfield, of Brancepeth, in the county of Durham, clerk, and Thomas Hopper, of the city of Durham, Esq., and their heirs, subject to the said annuities so given and devised as aforesaid; To hold the same unto the said R. E. D. Shafto, W. Nesfield, and T. Hopper, and their heirs, subject as aforesaid, to and for the several uses, upon the trusts, and to and for the intents and purposes, and under and subject to the powers, provisoes, declarations, and limitations hereinafter limited, declared, or expressed of and concerning the same; that is to say, to the use of my said brother, the said Morton John Davison, and his assigns, for and during the term of his natural life, without impeachment of or for any manner of waste; and from and immediately after the determination of that estate by forfeiture or otherwise in his lifetime, then to the use of the said Robert Eden Duncombe Shafto, William Nesfield, and Thomas Hopper, and their heirs, during the life of the said Morton John Davison, upon trust to support and preserve the contingent uses and estates hereinafter limited from being defeated or destroyed, and for that purpose to make entries and bring actions, as occasion shall require; but nevertheless to permit and suffer the said Morton John Davison and his assigns, during his life, to receive and take the rents, issues, and profits of the said hereditaments and premises, to and for his or their own use and benefit: and from and immediately after his decease, to the use of the first son of the said Morton John Davison, lawfully begotten, and of the heirs male of the body of such first son lawfully issuing; and for default of such issue, to the use of the second, third, fourth, and all and every other the

1850.

WILSON
v.
EDEN.

son and sons of the said Morton John Davison, lawfully to be begotten, severally, successively, and in remainder, one after another, as they shall be in seniority of age and priority of birth, and of the several and respective heirs male of the body and bodies of all and every such son and sons lawfully issuing, the elder of such sons, and the heirs male of his body, being always to be preferred and take before the younger of such sons, and the heirs male of his and their body or bodies; and in the default of such issue, to the use of Sir William Eden, Bart., his heirs and assigns for ever." And the said testator thereby constituted and appointed the said Morton John Davison executor of his said will.

The testator afterwards signed and published a testamentary paper, bearing date the 9th of March, 1835, purporting to be a codicil to his said will, and containing certain additions to and alterations of the annuities bequeathed by his said will, but not in any other manner affecting such will.

Morton John Davison, the brother of the testator, and the sole executor named in the will, died on the 28th of June, 1841, in the lifetime of the testator, and without ever having had any issue; and after his death, the testator duly signed and published another codicil to his said will, in the words and figures following:—"This is a codicil to the last will and testament of me, Sir Robert Johnson Eden, of Windlestone, in the county of Durham, Bart., which will is dated the 14th day of April, 1815. Whereas, by my said will, I appointed as the executor thereof my late only brother Morton John Davison, Esq., who died on the 28th day of June last: Now I do, by this codicil, appoint my nephew, John Methold, Esq., the sole executor of my said will: And I hereby ratify, confirm, and re-publish my said will. As witness my hand this 10th day of July, 1841. Robert Johnson Eden." (Then followed the attestation.) The said John

Methold afterwards took the name of Eden, instead of Methold.

The testator died on the 3rd of September, 1844, without having revoked or altered his said will, except so far as the same was altered by the said codicils thereto, and without having revoked or altered the said codicils, or either of them. And the said will and codicils have since been duly proved by the said John Eden, the executor thereof. The testator was, at the time of his death, possessed of several leasehold estates in the townships of Merrington and Middlestone, both in the parish of Merrington, in the county of Durham, held under various leases from the Dean and Chapter of Durham, for terms of twenty-one years respectively, a part of which leasehold estates was acquired by the testator's father in the year 1772, and the remaining portions thereof had been acquired by his father, or himself, at various times since (a). And the Dean and Chapter of Durham have hitherto renewed the leases under which the said estates were held at the end of every seven years (according to their usual custom with respect to property held under leases from them), but the leases contain no covenant on their part to do so.

In the year 1833 the Dean and Chapter of Durham demised the coal mines under the said leasehold estates, and other adjoining lands, with power to erect cottages and make a railway; and several cottages have accordingly been erected, and a railway made through part of

1850.
WILSON
v.
EDEN.

(a) At the suggestion of the Court, the case was amended by inserting the following—"And the dates of the different purchases are as follows, (that is to say) Sir John Eden purchased,

A. R. P.	
57 2 31	in the year 1772.
60 0 9	" 1776.
47 1 27	" 1780.

A. R. P.	
158 2 16	in the year 1788.
121 3 35	" 1801.
35 1 9	" 1803.
25 0 35	" 1808.

And the said testator, before the date of his will, purchased 17a. 3r. 5p. in the year 1813, and after the date of his will purchased 77a. 2r. 23p. in the year 1843."

1850.
WILSON
v.
EDEN.

the said leasehold estates. The testator was not at the time of his death possessed of or entitled to any leasehold estates for years, except in the townships of Merrington and Middleston.

The township of Middleston was heretofore in the parish of St. Andrew Auckland, but was on the 26th of April, 1845, annexed to the said parish of Merrington.

The parish of Merrington is intersected by a high ridge of hills, ranging east and west, upon the summit of which the church and village of Merrington are situated; and the greater portion of the said leasehold estates (to the extent of 539 acres, 38 perches, or thereabouts) lie to the south of the said ridge, and extend to and for about 2050 yards, abut on the northern boundary of the freehold manor and estate of the testator in the township of Windlestone, heretofore in the parish of St. Andrew Auckland, but now forming part of the new parish of Counden, which was made a parish in the year 1842, and adjoin the said freehold estate of Windlestone, but are in part separated therefrom by a turnpike road, and in part by the ordinary hedges of the country, through which are necessary communications for those tenants who hold both freehold and leasehold in the same farm, and in some instances the leaseholds were let and occupied with the said freeholds at undivided yearly rents.

The said leasehold estates are not intermixed with or surrounded by the freehold lands of the said testator at Windlestone, but, with the exception of one plot, containing about 18 acres, they lie together, and a part of them are about a quarter of a mile from the mansion of Windlestone, but the turnpike road between Bishop's Auckland and Rushyford lies between them and the said mansion. The remainder of the said leasehold estates, containing about 72A. 1R. 12P., lie on the northern side of the afore-said ridge, and about two miles from the testator's freehold mansion and estate at Windlestone.

1850.

WILSON

v.

EDEN.

The testator was, at the respective dates of making his will and of his death, seised of or entitled to, not only the said freehold manor and estate of Windlestone (which comprises the whole township of Windlestone, and contains 1182A. 2A. 29P.), but also two freehold closes of land immediately adjoining the said Windlestone estate, and situated in the township of Counden, and containing together about 16 acres, and the freehold tithes thereof; and also some detached portions of freehold lands in the said township of Merrington, and containing together about 106 acres; and the freehold tithes of parts of the said leasehold estate in Merrington and of Middlestone; an estate in the township of West Auckland, chiefly freehold and copyhold, with the freehold tithes thereof; and two leases for lives, containing together 1162 acres or thereabouts; and freehold lands in the township of Saint Helen's Auckland, containing 381 acres or thereabouts; two freehold fields, containing together about 19 acres, in the township of Bondgate, in Auckland; and the freehold messuage in the city of Durham: but which said freehold fields and messuage were afterwards sold by the testator in his lifetime.

The said freehold mansion and estate of Windlestone have been in the possession and the residence of the family of the said testator for upwards of one hundred years; and there are several cottages (some of which are ornamental) and other buildings standing upon that part of the said leasehold estates which is nearest the said mansion; and which buildings, consisting of three cottages called Well Houses, were, in the lifetime of the testator, occupied by persons employed about the said mansion and estate at Windlestone; and the testator, during his lifetime, expended upwards of 40,000*l.* in rebuilding or restoring the said mansion and premises.

On the 20th of February, 1845, Eleanor Wilson, one of the sisters and next of kin of the testator, filed her bill in

1850.
 WILSON
 v.
 EDEN.

the Court of Chancery against John Eden, the executor of the testator, and Sir W. Eden and others, praying (amongst other things) that it might be declared that the testator died intestate as to his leasehold estates, and that an account might be taken of the rents and profits, &c.

The question for the opinion of the Court is, whether the leasehold estates, of which the testator, Sir Robert Johnson Eden, died possessed, passed under the devise in his will of all and singular his manors or lordships, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, and arising, or being at or near Windlestone, West Auckland, St. Helen's Auckland, and Bishop's Auckland, in the county of Durham or in the city of Durham, and Bringnall in the county of York, and all other his real estates in the said counties of York and Durham, and elsewhere in Great Britain, and all his estate and interest therein (a).

(a) It was agreed that the will should form part of the case; but the only other portions of it material to the present question are the following:

"Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful for the said Morton John Davison, when and as he shall, by virtue of the limitations aforesaid, be in the actual possession of, or entitled to, the rents, issues, and profits of the said hereditaments and premises, by any deed or deeds, &c., to grant, limit, or appoint to or to the use of any woman or women whom he may marry, either before or after any such marriage, for the life of any such woman, for her jointure, and in bar or without being in bar of her dower, any annual sum or

yearly rent-charge, not exceeding the annual sum of one thousand pounds, &c., to be issuing out of and charged and chargeable upon all or any part or parts of the said hereditaments and premises hereinbefore devised, with the usual powers and remedies of distress, entry, &c.; and also to limit and appoint the hereditaments which shall be so charged as aforesaid, to any person or persons, for any term or terms of years, upon such trusts, for better securing the payment of any such yearly rent-charge, as to the said M. J. Davison shall seem meet," &c. "Provided always, and I do hereby declare my will and mind to be, that it shall and may be lawful to and for the said M. J. Davison during his life, and, after his decease, for the person or persons who shall,

1850.
 WILSON
 v.
 EDEN.

Humphry (*Elmsley* with him) argued for the plaintiff in last Trinity Term (June 7).—The leaseholds did not pass under the general devise of the real estate. The will commences with a marked distinction between the real and personal estate. The real estate is charged with the payment of debts and testamentary expenses, and it is devised to trustees and their heirs, for the use of a tenant for life without impeachment of waste, and after the determination of that estate to trustees, to preserve contingent remainders,—provisions inapplicable to leaseholds. First, as to the law prior to the Wills Act, 1 Vict. c. 20. The rule laid down in *Rose v. Bartlett* (a) is this, "That if a man hath lands in fee and lands for years, and deviseth *all his lands* and tenements, the fee simple lands pass only, and not the lease for years; and if a man hath a lease for years and no fee simple, and deviseth *all his lands* and tenements, the lease for years passeth, for otherwise the will should be merely void." That rule was recognised and commented on by Lord *Eldon*, C. J., in his elaborate judgment in *Thompson v. Lady Lawley* (b), where he says, that it "is a rule which has been acknowledged for ages." Also, in *Watkins v. Lea* (c), Lord *Eldon*, C. J., refers to that rule with approbation. Numerous cases in which the rule has been acted on are collected in *Jarman on Wills*, vol. 1, p. 616; and *Roper on Legacies*, vol. 2, p. 1488, 4th ed. The word "farm," which is not used here, is of large ex-

for the time being, under or by virtue of the limitations aforesaid, be in the actual possession of or well entitled to the hereditaments and premises aforesaid, or the rents, issues, and profits thereof, from time to time, to demise and lease all or any part or parts of the said hereditaments and premises, with the appurtenances, to any person or persons, for any term or number of years not exceeding

twenty-one years in possession, and not in reversion or by any way of future interest, so as there be reserved and made payable on every such lease, during the continuance thereof, the best and most improved yearly rent or rents," &c.

(a) Cro. Car. 292.

(b) 2 Bos. & P. 303.

(c) 6 Ves. 633.

1850.

WILSON
v.
EDEN.

tent: Shep. Touch. chap. 5, p. 93; yet where the devise was of "all that freehold farm called the Wick Farm, containing 200 acres or thereabouts, occupied by E. as tenant to me," to uses applicable to freehold property only, and E. held under a lease from the testator 202 acres of land, described in the lease as Wick Farm, of which twelve acres were leasehold, it was held that the twelve acres did not pass by the devise: *Hall v. Fisher* (a). In *Arkell v. Fletcher* (b), the testator devised to trustees all his messuages or tenements, farms, lands, hereditaments, and premises, situate in C. and W., upon trust, for the use of his wife for life, with limitations after her decease which were applicable to freeholds only; and he gave all his personal estate to his wife for her sole use. The testator was seised in fee of freehold lands in C., W. and S., but there was no messuage or other building on any of those lands, except a wooden barn and stable on the land in S. He was also possessed of land in C. for a long term of years, on which there was a messuage and farm buildings; and he had occupied the freehold and leaseholds as one farm, but they did not adjoin each other: and it was held that the leaseholds did not pass under the devise of all the testator's messuages, tenements, farms, &c. So, where a testator devised his freehold messuage, farm, lands, and hereditaments, in the county of B., upon certain trusts; and the testator had a farm in that county, of which the messuage and the greater part of the land were freehold, and the other parts leasehold at pepper-corn rents; and the latter were interspersed with and undistinguishable from the freehold part, and had been demised therewith as one farm at one entire rent, and the testator had always treated them as freehold: it was nevertheless held, that the leasehold part did not pass under the devise: *Stone v. Greening* (c). Again, in *Parker v. Marchant* (d), it was held, that chattel leaseholds

(a) 1 Coll. 47.

(b) 10 Sim. 299.

(c) 13 Sim. 390.

(d) 2 Y. & C. C. C. 279.

did not pass under a devise of testator's messuages, lands, tenements, and real estate. In *Addis v. Clement* (a), where the devise was of all the messuages, lands, and tenements, in the parish of D., which the testator then stood "*possessed of or any ways interested in*," the leaseholds were held to pass, on the ground that those words properly referred to leasehold estates; and therefore the case was distinguishable from *Rose v. Bartlett*, in which those words were not found. In *Day v. Trigg* (b), where leaseholds were held to pass under a devise of freehold houses, the testator had none but leasehold houses; and therefore the Court considered, that as it was the plain intention of the will to pass *some* houses, the word "freehold" should rather be rejected than the will be rendered void. In *Doe d. Dunning v. Cranstoun* (c), the leasehold lands, though incorrectly described as "freehold," were sufficiently ascertained by the will, and on that ground were held to pass. *Goodman v. Edwards* (d), and *Hobson v. Blackburn* (e), were also decided on the principle, that, if upon the whole will it plainly appear that the testator meant to pass leasehold property under the description of real estate, effect will be given to his intention.

Secondly, the case is not governed by the 26th section of the 1 Vict. c. 26 (f). The question depends on the effect

1850.
WILSON
v.
EDEN.

(a) 2 P. Wms. 456.

(b) 1 P. Wms. 286.

(c) 7 M. & W. 1.

(d) 2 My. & K. 759.

(e) 1 My. & K. 571.

(f) Enacts: "That a devise of the land of the testator, or of the land of the testator in any place or in the occupation of any person mentioned in his will, or otherwise described in a general manner, and any other general devise which would describe a customary, copy-

hold, or leasehold estate if the testator had no freehold estate which could be described by it, shall be construed to include the customary, copyhold, and leasehold estates of the testator, or his customary, copyhold, and leasehold estates, or any of them, to which such description shall extend, as the case may be, as well as freehold estates, unless a contrary intention shall appear by the will."

1850.
 WILSON
 v.
 EDEN.

of the republication of the will, how far, if at all, it brings the case within that enactment; and it is submitted, that the statute was never intended to apply to cases where all the real estate is in terms devised to one person, and the personal estate to another, but only where there is a general devise in terms large enough to import any tenure. Besides, in this case, there is no devise of the land of the testator "in any place," but only "*at or near*" Windlestone. Assuming, however, that the statute does apply, still the general devise will not include the leaseholds, because a contrary intention appears by the will. Here is an express gift of all the residue of the personal estate to the testator's brother, which is inconsistent with a gift of the leaseholds to the trustees. The words "all other my real estates" mean "freehold" estates. The powers of jointuring and leasing are also inconsistent with an intention that the trustees should take the leaseholds. *Cole v. Scott* (a) decided, that it is not necessary that such contrary intention should be expressed in so many words, or in some way quite free from doubt; but it is to be gathered by adopting, in reference to the expression used by the testator, the ordinary rules of construction applicable to wills.

Malins for the defendant.—First, as to the effect of the limitation prior to the 1 Vict. c. 26. Though, as a general rule, a devise of "*land*" would pass only real estate, yet the exceptions were, if the circumstances shewed an intention on the part of the testator that the leaseholds should pass, or if he had no freehold land to satisfy the bequest. Here an intention to pass the leaseholds may reasonably be presumed. In the first place, the leaseholds had been from time to time renewed, so that the testator, no doubt, considered them as a durable property, and in the nature

(a) 1 Mac. & G. 518.

1850.
 WILSON
 v.
 EDEN.

of real estate. Besides, from the year 1772, there had been an uninterrupted unity of enjoyment of some of the leaseholds with some of the freeholds at entire rents, without distinguishing what was paid for the leasehold, and what for the freehold. And further, the leaseholds almost entirely bordered on the family mansion and grounds, and part of them extended up to within a quarter of a mile of the mansion, and some cottages had been erected thereon by the testator for the use of persons employed about the mansion. Those circumstances take this case out of the general rule laid down in *Rose v. Bartlett* (a). There is a distinction between permanently renewable leaseholds and a mere lease for a definite term of years, as was the case in *Thompson v. Lady Lawley* (b). That distinction is adverted to in *Addis v. Clement* (c), where it was held, that the words "possessed of or any ways interested in," included renewable leaseholds. This case resembles that of *Lane v. Earl Stanhope* (d), where the lease contained no covenant for renewal on the part of the lessor, but the Court referred to extrinsic circumstances as shewing the intention of the testator, and held that the leasehold estate passed under a devise of "all my manors, messuages, houses, farms, lands," &c. Also, in *Hobson v. Blackburn* (e), where the limitation was to uses strictly applicable to freehold property only, the Court looked to the intention of the testator, to be collected from the circumstance of the leasehold property being blended in enjoyment with the freehold. [*Alderson*, B.—In that case, there was no other access to the leasehold part than by its communication with the freehold.] In *Goodman v. Edwards* (f), the devise was of land, containing by estimation 100 acres, forty of which were held under a renewable lease; but they were nevertheless held to pass, as the circumstances shewed

(a) Cro. Car. 292.

(b) 2 Bos. & P. 303.

(c) 2 P. Wms. 456.

(d) 6 T. R. 345.

(e) 1 Myl. & K. 571.

(f) 2 Myl. & K. 759.

1850.

WILSON
v.
EDEN.

that the testator meant to comprise them under the description of real estate.

Secondly, The case falls within the 1 Vict. c. 26. The 34th section (a) of that Act expressly declares, "that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time it was so re-executed, republished, or revived." The effect of the republication of the will by the codicil was the same as if the testator had, at the date of the codicil, made a will in the words of the will so republished: *Doe d. York v. Walker (b)*, *Winter v. Winter (c)*. Then, by the 26th section, a general devise of land shall include copyhold and leasehold, unless a contrary intention shall appear by the will. That statute has abrogated the rule laid down in *Rose v. Bartlett*, which so frequently frustrated the intention of testators. The effect of the enactment is to introduce the words "copyhold" and "leasehold" into a general devise of land, so that it must now be read, "all and singular my freehold, copyhold, and leasehold lands." The word "land" now means everything immoveable, unless a contrary intention appears. If the devise had been of "all my freehold and copyhold lands," the mention of the two descriptions would have shewn an intention to exclude the third. Or if the testator had said, "I give all my leasehold estate in the county of York," that would have shewn an intention to exclude his leaseholds elsewhere. Here, however, the word "freehold" is not used, but the devise is in general terms. Even before the 1 Vict. c. 26, leaseholds *for lives* would pass

(a) Enacts: "That this Act shall not extend to any will made before the 1st day of January, 1838; and that every will re-executed, or republished, or revived by any codicil, shall, for the purposes of this Act, be deemed to have been made at the time at

which the same shall be so re-executed, republished, or revived; and that this Act shall not extend to any estate *pur autre vie* of any person who shall die before the 1st of January, 1838."

(b) 12 M. & W. 591.

(c) 5 Hare, 306.

under a devise of "all other my real estate:" *Fitzroy v. Howard* (a), *Weigall v. Brome* (b).

1850.
WILSON
v.
EDEN.

Humphry replied.

Cur. adv. vult.

The judgment of the Court was now delivered by

POLLOCK, C. B.—This case, which was sent for our opinion by the Master of the Rolls, arises out of the will of Sir Robert Johnson Eden, who died on the 3rd of September, 1844; and the question is, whether certain leasehold estates, of which he was possessed at his decease, passed under the general devise of his real estates. The will was made in 1815, and its material parts are as follows [his Lordship stated them]:—Morton John Davison died in June, 1841, and thereupon the testator made a codicil, duly executed and attested, in the following words [his Lordship read the codicil]. The facts, as to the leaseholds in question, are these [his Lordship stated them]. The case states as a fact, that the testator, at the date of his will and of his death, was seised of other real estates in the county of Durham, besides his mansion, &c. at Windlestone.

In this state of things, it was contended before us, on behalf of the plaintiff, that the leaseholds did not pass under the general devise of the real estates. And in support of this view of the case, Mr. *Humphry* relied on the case of *Rose v. Bartlett*, in which the general principle was laid down, recognised and followed by very many authorities up to *Thompson v. Lawley*, where Lord *Eldon* went through the whole of the cases, and fully recognised the general doctrine. On the other hand, Mr. *Malins*, for the defendants, contended, that there are in this case circumstances which distinguish it from *Rose v. Bartlett* and the other cases in which leaseholds have been held not to pass. In the first place, here the leaseholds, by

(a) 3 Russ. 225.

(b) 6 Sim. 99.

1850.

WILSON

v.

EDEN.

usage, though not by express contract, have always been renewed from time to time, so as to give them, practically, the permanence of estates held in fee simple. Secondly, some of the leaseholds have been let and occupied with some of the freeholds at undivided yearly rents, not distinguishing what was the rent of the freehold and what of the leasehold; and, Thirdly, the leaseholds almost entirely bordered on the family mansion and grounds, and some part of them extended up to within a quarter of a mile of the mansion; and some cottages were erected thereon by the testator, for the use of persons employed about the mansion.

These, and similar circumstances are pointed out by Lord *Eldon* in the case we have referred to, as circumstances which might prevent the operation of the general rule. But even if they would not do so in the present instance, still, it was contended, that here the late statute, 1 Vict. c. 26, s. 26, is decisive, and puts an end to all question on the subject. [His Lordship read the section.]

Now, we are of opinion that this section clearly governs the present case, and so that it is unnecessary for us to speculate as to what our decision would have been, if we had been called on to make it in 1837, and not in 1850. In the first place, the will having been re-published by the codicil in 1841, must, according to the express provisions of section 34, be deemed to have been made at that date; and it is, therefore, to be treated as a will made after the 31st of December, 1837.

That being so, let us consider how the case would have stood prior to the Act, if the testator had had no lands whatever except these leaseholds. It is clear that, in such a case, the leaseholds would have passed, in order that some effect might be given to the will. This, indeed, is a branch of the general rule enunciated in *Rose v. Bartlett*, and cannot be disputed. This being so, the 26th section of the statute states positively, that the general

devise shall be construed to include the leaseholds, unless a contrary intention appears by the will.

Mr. *Humphry* argued, that such contrary intention does appear here, because there is an express gift of all the residue of the personal estate to the testator's brother, which, he contended, was inconsistent with a gift of the leaseholds, which are part of the personal estate, to the trustees for the purpose of the settlement. But this is a fallacy. If, before the statute, a testator, having leaseholds but no freeholds in Durham, had given all his lands in Durham to A. B., and all his personal estates to C. D., there can be no doubt but that A. B. would have taken the leaseholds. The circumstances, in such a case, shew that, under the words personal estate, the testator did not mean to include his leaseholds; and if such would have been the construction before the statute, in a case where the testator had only leaseholds, so now the same construction is, by the express words of the statute, to prevail, even though the testator had freeholds as well as leaseholds. The gift of *all my personal estate*, clearly means only all my personal estate not otherwise disposed of, and when the statute has made the general devise a valid disposition of the leaseholds, it follows that these are not included in the general description of all my personal estates, or all the residue of my personal estate.

The only other circumstances relied on by Mr. *Humphry*, as shewing an intention to exclude the leaseholds, were the powers of jointuring and leasing. But we attribute no weight to this part of his argument. The powers would be available in equity, so as to affect the renewed leases from time to time, and the case finds as a fact that such renewals were always regularly made.

It remains only to notice one other argument of Mr. *Humphry's*, namely, that he had no necessity to resort to the words at the end of the clause, "unless a contrary intention appears on the face" of the will, for that here the

1850.

WILSON

v.

EDEN.

1850.

WILSON
v.
EDNEY.

case was not brought within the enacting part of the section; he contended, that there is not here any *devise of the land of the testator in any place*, so as to come within the language of the statute. But in this Mr. *Humphry* is certainly wrong. The words of the will are, "I give and devise (inter alia) all my lands near Windlestone, &c., and all my other real estates in Great Britain, and all my estate and interest therein, unto &c. &c." Surely a devise of my lands *near Windlestone* is a devise of the testator's lands *in some place*; and certainly the words amount to a general devise, which, before the statute, would have included leaseholds, if there had been no freeholds to which the description would apply.

We think it clear, therefore, first, that the enacting words of the 26th section apply to this case; and, secondly, that no contrary intention appears on the face of the will, so as to prevent the operation of the enactment. This being our view of the effect of the statute, it is unnecessary to consider how the case would have stood independently of the statute; but we must say, there are very strong grounds for contending that the facts of this case might have led to the same result as that which we have arrived at, even if the statute had not passed.

We shall certify our opinion to the Master of the Rolls in conformity with the opinion we have expressed.

Certificate accordingly.

1850.

BRADLEY v. THE LONDON AND NORTH WESTERN RAILWAY
COMPANY.

Nov. 4.

IN this case a rule had been obtained by the London and North Western Railway Company, calling on one Bradley to shew cause why a rule of the 7th of May should not be discharged, and why the award of one S. D. Martin, contained in the said rule, should not be set aside, upon the ground that the arbitrator had awarded respecting several matters over which he had no jurisdiction. A cross rule had been also obtained, calling on the London and North Western Railway Company to shew cause why they should not pay to T. Bradley the sums of 900*l.* and 239*l.* 9*s.* pursuant to a rule of the 7th of May, and to the award of one S. D. Martin.

It appeared from the affidavits, that the Huddersfield and Manchester Railway and Canal Company (incorporated by the 11 Vict. c. cliv. with the London and North Western Railway Company), by the exercise of the powers and authorities conferred by their Acts, constructed a tunnel under the town of Huddersfield, and so near to the premises of Thomas Bradley as to cause considerable damage thereto. In October, 1849, Bradley claimed compensation from the Company, but they refused to recognise his claim. On the 5th of December he sent to the Company a notice, which, after specifying the injury sustained by him, stated that he claimed compensation in pursuance of the statute in such case made and pro-

A railway Company having refused compensation for injury done to the premises of B., he, on the 5th of December, served them with a notice under 8 & 9 Vict. c. 18, requiring them to appoint an arbitrator on their behalf, and stating that it was his intention to appoint M. as his arbitrator; and that if, for the space of fourteen days after that notice, the Company failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The Company having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which,

after reciting that he had appointed M. as his arbitrator, stated that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a certain sum to be paid to B., the Court refused to enforce or set aside the award on motion, intimating their opinion that there was no valid appointment of the arbitrator.

Semble, that, under the 8 & 9 Vict. c. 18, s. 25, an appointment by the claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator on his behalf, and notified such appointment to the Company.

1850.
 {
 BRADLEY
 v.
 LONDON AND
 NORTH
 WESTERN
 RAILWAY CO.

vided(a), to the amount of 1250*l*. The notice then proceeded thus:—

“And further take notice, that unless you, the said Company, are willing to pay to me the said sum of 1250*l*., and shall enter into a written agreement for that purpose within twenty-one days after the receipt by you of this notice, then it is my desire that the amount of compensation to be paid to me by you, by reason of the premises, shall be settled by arbitration, according to the provisions of the act or acts of parliament in that case made and provided. And if you the said Company fail to

(a) 8 & 9 Vict. c. 18, s. 25, en-acts, “When any question of disputed compensation, by this or the special Act, or any Act incorporated therewith, authorised or required to be settled by arbitration, shall have arisen, then, unless both parties shall concur in the appointment of a single arbitrator, each party, on the request of the other party, shall nominate and appoint an arbitrator, to whom such dispute shall be referred; and every appointment of an arbitrator shall be made on the part of the promoters of the undertaking, under the hands of the said promoters, or any two of them, or of their secretary or clerk, and on the part of any other party under the hand of such party, or if such party be a corporation aggregate, under the common seal of such corporation; and such appointment shall be delivered to the arbitrator, and shall be deemed a submission to arbitration on the part of the party by whom

the same shall be made: and after any such appointment shall have been made, neither party shall have power to revoke the same without the consent of the other, nor shall the death of either party operate as a revocation; and if, for the space of fourteen days after any such dispute shall have arisen, and after a request in writing, in which shall be stated the matter so required to be referred to arbitration, shall have been served by the one party on the other party to appoint an arbitrator, such last-mentioned party fail to appoint such arbitrator, then, upon such failure, the party making the request, and having himself appointed an arbitrator, may appoint such arbitrator to act on behalf of both parties, and such arbitrator may proceed to hear and determine the matters which shall be in dispute, and in such case the award or determination of such single arbitrator shall be final.”

pay me the said sum of 1250*l.*, or to enter into such written agreement as aforesaid within the said twenty-one days, then and in that case I do hereby request and require you, the said Company, to nominate and appoint an arbitrator to act on your behalf in the matter of the said arbitration. And further take notice, that it is *my intention* to nominate and appoint Samuel Dickinson Martin, of Leeds, in the county of York, surveyor and engineer, as my arbitrator in and concerning the matters aforesaid; and that if for the space of fourteen days after the service of this notice and request, you, the said Company, shall fail to nominate and appoint an arbitrator to act in your behalf as aforesaid, I, the said Thomas Bradley, *will* appoint the said S. D. Martin to act on behalf of both parties. Witness my hand this 5th day of December, 1849.

“THOMAS BRADLEY,
“ of Huddersfield, in the county of York.”

1850.
—
BRADLEY
v.
LONDON AND
NORTH
WESTERN
RAILWAY Co.

The Railway Company having, on the 26th of December, refused to refer the matter to arbitration, Bradley served the Company with a written document, dated the 1st of January, 1850, which, after reciting the notice of the 5th of December, concluded in these terms:

“And whereas a space of more than fourteen days and more than twenty-one days have long since elapsed after the said dispute as aforesaid had arisen, and after the said notice and request in writing had been made and served upon the said Company; and the said Company have for the space of more than fourteen days and more than twenty-one days after the said dispute had arisen, and after the service of the said notice and request upon the said Company as aforesaid, failed and refused to appoint any arbitrator in the said matters in dispute. And whereas I, the said

1850.
 BRADLEY
 v.
 LONDON AND
 NORTH
 WESTERN
 RAILWAY CO.

Thomas Bradley, did by the said notice and request in writing appoint the said Samuel Dickenson Martin my arbitrator in the matters in dispute as aforesaid. Now I, the said Thomas Bradley, in pursuance of the statute in such case made and provided, appoint the said Samuel Dickenson Martin to act as arbitrator on behalf of both parties in the said matters in dispute. Dated the 1st of January, A.D. 1850.

"THOMAS BRADLEY,"

The arbitrator accordingly made appointments for proceeding with the reference, which was attended on the 23rd and 24th of January by Bradley and his attorney, and by the attorney on behalf of the Company under protest, who submitted to the arbitrator that the damages claimed were not recoverable under the Lands Clauses Consolidation Act, and that the present mode of proceeding was not the right mode of recovering damages. The Company also delivered a written notice to Bradley, to the effect, amongst other things, that his notices were informal and invalid; and that the Company would treat all proceedings under them as informal and ineffectual. On the 26th of March, the arbitrator in his award, which recited the previous proceedings including the two notices, awarded to Bradley the sum of 900*l.* as compensation, and 239*l.* 9*s.* as costs.

Hoggins and *Hugh Hill* shewed cause on behalf of the claimant Bradley against the former rule, and appeared in support of the latter.—It is objected, that the claimant did not make a valid appointment of an arbitrator within the 25th section of the 8 & 9 Vict. c. 18, inasmuch as his notice merely stated *his intention* to appoint Martin as arbitrator. To that there are two answers: first, the document of the 1st of January, 1850, after reciting the notice, states that Bradley did, in pursuance of the statute, ap-

point Martin as his arbitrator; and if the fact were not so, it should have been denied by affidavit. Secondly, the Railway Company having, for the space of fourteen days, failed to appoint an arbitrator, Bradley was empowered by the statute to appoint one to act on behalf of both parties, and that he has done by the document of the 1st of January, 1850. [Alderson, B.—It seems that there must be two appointments. Parke, B.—The claimant should appoint an arbitrator on his behalf; and then, after notification of such appointment, and request in writing, if the other party fails for the space of fourteen days to appoint an arbitrator on his behalf, the claimant may appoint one to act for both. The ground for requiring an actual appointment of an arbitrator by the claimant is, that the other party may consider whether he will acquiesce in that appointment. Here, there has been no notice of any appointment, but only of an intention to appoint. Pollock, C. B.—Bradley was not bound by the notice to appoint Martin as his arbitrator; he might, after sending it, have altered his intention, and appointed some one else; and how could the Company be certain that he would not? There must be an appointment from which the claimant cannot recede, so that, if the other party were contented with the person named, that party might be sure of his services.] The section does not in terms require that notice of the appointment of an arbitrator by the claimant should be given to the other side; and as other conditions precedent are mentioned, the rule, *expressio unius est exclusio alterius*, applies. The appointment of an arbitrator to act for the claimant, and afterwards for both parties, may be made by the same instrument. [Parke, B.—If the Company had consented under seal to the appointment, perhaps it might have been good within the previous part of the section; but here the question is, whether the claimant can appoint an arbitrator to

1850.
 BRADLEY
 v.
 LONDON AND
 NORTH
 WESTERN
 RAILWAY CO.

1850.
BRADLEY
v.
LONDON AND
NORTH
WESTERN
RAILWAY CO.

act for both parties, unless he has previously appointed one on his own behalf.] At all events, there is sufficient doubt as to the meaning of the section to warrant the Court in discharging the rule; and the validity of the award may be contested in an action, and the point decided by a Court of Error.

Watson (*Cleasby* with him) in support of the rule.— This is a proceeding *in invitum*, and everything must appear on the face of the document to shew jurisdiction. *Rex v. The Trustees of the Norwich and Watton Road*(a). Now the notice to the Company only states an intention to appoint an arbitrator, not an actual appointment; and the instrument of the 1st of January, 1850, states the appointment by way of recital only.

POLLOCK, C. B.—We are all of opinion that both rules ought to be discharged, but without costs.

Rules discharged, without costs.

(a) 5 A. & E. 563.

1850.

MILLWARD v. LITTLEWOOD.

Nov. 6.

ASSUMPSIT.—The declaration stated, that, on &c., in consideration that the plaintiff, being sole and unmarried, had, at the defendant's request, promised the defendant to marry him, the defendant promised the plaintiff to marry her. Averment, that the plaintiff hath always, from the time of the making of the defendant's promise, for a reasonable time, to wit, until &c., continued and still is unmarried, and was, from the time of the defendant's promise until the discovery hereinafter mentioned, ready and willing to marry the defendant. That, after the making of the defendant's promise, and before the commencement of this suit, to wit, on &c., the plaintiff discovered that the defendant was then married, to wit, to one Hannah Littlewood; and that the defendant, at the time of making his promise, and from thence hitherto, hath been and still is married; and that the plaintiff had not, at the time of the defendant's then promise, any notice of the defendant's then marriage.

Pleas, first, non-assumpsit; secondly, that the plaintiff had notice of the defendant's marriage.

At the trial, before *Parke*, B., at the last Chester Summer Assizes, the jury found a verdict for the plaintiff, damages 200*l*.

Herbert Jones, Serjt., now moved to arrest the judgment.—It is conceded, that this case is similar to *Wild v. Harris* (a), where the declaration alleged, that, in consideration that the plaintiff, being unmarried, had promised the defendant to marry him within a reasonable time, the defendant pro-

A declaration alleged, that, in consideration that the plaintiff, at the defendant's request, promised to marry him, he promised the plaintiff to marry her. Averments: that the plaintiff hath continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready and willing to marry him; that, after the defendant's promise, the plaintiff discovered that the defendant, at the time of his promise, was, and still is, married, and that the plaintiff had not, at the time of the defendant's promise, any notice of the defendant's then marriage:—*Held*, on motion in arrest of judgment, that the declaration was good; and that the plaintiff's remaining unmarried

was a sufficient consideration to support the defendant's promise.

Quære, whether a promise by a married man to marry another woman after his wife's death, is void.

(a) 7 C. B. 999.

1850.
MILLWARD
v.
LITTLEWOOD.

misled the plaintiff to marry her within a reasonable time; that the plaintiff remained unmarried, and had always, until she had notice that the defendant was married, been ready and willing to marry him; that, although a reasonable time had elapsed, the defendant had not married the plaintiff, but, on the contrary, the defendant, at the time of his promise, was and still is married to another woman; and on the motion in arrest of judgment, the Court of Common Pleas held, that the declaration disclosed a sufficient consideration for the defendant's promise; at the same time observing, that it was not absolutely impossible of performance, for the defendant's wife might have died within a reasonable time. The only difference between that case and the present is, that there the promise alleged was to marry within a reasonable time, here it is to marry generally. It is submitted, however, that the case of *Wild v. Harris* cannot be supported. A contract of this kind is contra bonos mores, and against public policy. The language of Lord Mansfield, in *Holman v. Johnson* (a), with reference to immoral and illegal contracts, applies here. Besides, at the time of the promise, the defendant could not perform it, and, therefore, the promise is void. The Court of Common Pleas founded their judgment on the authority of Brooke's Abridgment, tit. "Conditions," fol. 152 b, pl. 119 (b). That, however, professes to be an abridgment of the case in 40 Ass. 13 (c), where the reporter

(a) Cowp. 343.

(b) "Ass. feñ fuit ssī, et infesse hōe q̄ auoit feñ sur cōdiç q̄ il luy marriera, le fessée infesse A., que infesse B., q̄ infesse C., que infesse D., le priñ fessée deuie, le feñ enī sur D. xvi ās ap̄s, et lenī bōe, car ceo est admit bō condiç, car comīt q̄ le fessée ne puit marry al temps del fessēnt, dnç poet estī q̄ sa feñ deuiera, et dōqs il puit aū marry le fesseres, et ideo bon condiç, et lenī congeable."

(c) "Un assise fuit port envers ū feme: qui pl' nul tort, et le verdict vient et dit, coment la feme fuit de mī la terf en sa demeñ come de fee, et de mī la terre enfeoffa ū J. sur cōdition, q̄l luy duist prēdr̄ a feme, le q̄l J. av' une feme a ceo temps, le q̄l J. enfeoffa oust' ū aut, et il oustī; et issint plusieurs feoffemēts tanq̄ le pl' ore fuit enfeoffe: et trove fuit, q̄ celui qui primes fuit enfeffe p' la condiç, fuit mort, et q̄ les feoff. fuē con-

adds, "quære de isto judicio, for it seems that the condition was void, because the feoffee had a wife at the time." [Parke, B., in Fitz. Nat. Brev. p. 205, H., it is said, "A woman enfeoffed a man upon condition that he should take her to wife, and he had a wife at the time of the feoffment, and afterwards, the woman, for not performing the condition, entered again into the land upon the second feoffee, and her entry was adjudged lawful, and the condition good." Anno 40 Ed. 3, Lib. Ass.]

1850.
MILLWARD
v.
LITTLEWOOD.

POLLOCK, C. B.—There ought to be no rule. The case of *Wild v. Harris* does not in substance differ from this. Therefore, as there is the judgment of a Court of co-ordinate jurisdiction upon the express point, I feel myself bound by it, and must leave the parties to question that decision in a Court of Error. I own, however, that I am disposed to differ from the authorities which have been referred to. I think it is inconsistent with that affection which ought to subsist between married persons, that a man should, while his wife is alive, promise to marry another woman after his wife's death. Nothing but the judgment of the highest tribunal will compel me to think, that, by the law of the land, such a promise is good.

ALDERSON, B.—It is unnecessary to decide whether a promise by a man to marry a woman after his wife's death is good, because here it is found as a fact that the plaintiff had no knowledge that the defendant was married. In my opinion the difficulty arises in respect of the promise alleged being a promise to marry within an indefi-

tinus issint p' xvi ans, et q̃ la feme entra sur cēy q̃ est ore pl'. Et sur ceo ils fueñ adjorñ a W. ou p' avise de tous les Justiç fuit ag', q̃ le pl' ne prist riç p' son bñe, eo q̃ la tñe fuit tous temps charg' ove

la conditiō; issint l'enñ congeable pur la conditiō enfreint, ē q̃ mainz la tñe fuit. *Quære de isto Judicio*: car come semble la cōdiç fuit void, eo q̃ le feoffee av' feme a ceo temps, *ut supra. Ideo quære.*"

1850.
MILLWARD
v.
LITTLEWOOD.

nite time. What was decided by the recent case in the Court of Common Pleas, I think, was rightly decided.

PARKE, B.—I entirely concur in what was said by the Court of Common Pleas in *Wild v. Harris*. The promise by the defendant to marry the plaintiff implies, on his part, that he is then capable of marrying, and he has broken that promise at the time of making it. The consideration to support the promise is, that the plaintiff, at the request of the defendant, engaged to marry him within a reasonable time, and therefore she remained unmarried; and that is a sufficient consideration to bind the defendant. It is unnecessary to express any opinion, whether a promise by a married man to marry a woman after his wife's death, is valid or not. The passage in Fitzherbert's Abridgment tends to shew that it is a good promise. Here, however, it is enough to say, that there is a sufficient consideration for the defendant's promise, namely, that the plaintiff remained unmarried; and if she discovered, on the day after the defendant's promise, that he was a married man, I should nevertheless say that the consideration would be sufficient.

Rule refused.

1850.

TAYLOR v. BULLEN.

Nov. 13.

CASE.—The first count of the declaration stated, that the plaintiff, at the request of the defendant, bargained and agreed with the defendant to buy of him a certain ship or vessel of the defendant, called the "Intrepid," together with certain stores, chattels, and appurtenances thereto belonging, at and for a certain price, to wit, 2200*l*.; and the defendant then, during such bargaining and agreeing, falsely, fraudulently, and deceitfully warranted the said ship to be teak-built, and together with the said appurtenances to be of the description or quality known as A 1, and to be well adapted for a passenger ship, and thereby then induced the plaintiff to agree for and buy, and accordingly by the means aforesaid then agreed to sell and sold the same, together with the said stores, chattels, and appurtenances, to the plaintiff; whereas, in truth and in fact, the said ship, at the time of the warranty, agreement, and sale, was not teak-built, and was not, together with the said appurtenances, of the description or quality known as A 1, and was not adapted for a passenger ship. Averment, that, by means of the premises, the defendant had falsely and fraudulently deceived him the plaintiff on the said agreement for and sale of the said ship, and thereby the said ship is of much less value to the plaintiff, &c. (alleging special damage).

Third plea.—That the defendant did not warrant *modo et formâ*: concluding to the country.—Issue thereon.

This action came on to be tried at the sittings in London after last Michaelmas Term, 1849, when, by consent

The defendant, being the owner of a ship, advertised its sale, describing it as "The fine teak-built barque 'Intrepid,' A. 1, and well adapted for a passenger ship." The plaintiff, having read the advertisement, negotiated for its purchase, and a contract was signed by the plaintiff and defendant, whereby the former agreed to buy and the latter to sell "the barque 'Intrepid,' as she now lies in the St. Katherine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement: under that was the word "Inventory," which was followed by a list of the ship's stores

and tackle; and in the margin, opposite to this list, the defendant signed his name. The document concluded thus:—"The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The vessel proved not to be teak-built, nor of class A 1, nor adapted for a passenger-ship:—*Held*, first, that the whole of the above document was incorporated with the contract of sale, and not merely the list of stores headed "Inventory."—Secondly, that there was no warranty of the vessel.

1850.
TAYLOR
v.
BULLEN.

of the parties, a verdict was taken for the plaintiff on the first count of the declaration, subject to the opinion of the Court, whether the facts hereinafter stated entitled the plaintiff to maintain such verdict upon the third issue. If so, the said verdict is to stand, subject to the decision of an arbitrator upon another issue joined between the parties; but if not, the said verdict is to be set aside, and a verdict on the third issue entered for the defendant. The issues arising out of the second count were by consent found for the defendant.

In June, 1848, the defendant, being the sole owner of the barque "Intrepid," caused the following advertisement to be inserted in the Shipping Gazette:—"The fine teak-built barque, 'Intrepid,' A 1, 286½ tons register, built under particular inspection at Coringa in the year 1842, of the best materials, shifts without ballast, carries a good cargo, has a poop and excellent height between decks, and is well adapted for a passenger ship. Length 91 5-10ths feet, breadth 22 feet 8 inches, depth 16 feet 8 inches. Now lying in the St. Katherine Docks. For inventories and further particulars, apply to J. H. Arnold, 3, Clement's-lane, Lombard-street."

The plaintiff, having read such advertisement and seen the said ship, negotiated, by F. J. Mercer, his agent, for the purchase of the said vessel; and on the 11th of July, 1848, the following contract was signed by Mercer and the defendant:

"F. J. Mercer agrees to buy, and Captain Bullen agrees to sell, the barque Intrepid, as she now lies in the St. Katherine Dock, agreeable to the Inventory annexed, for the sum of 2200*l*." (It then provided for the mode of payment).

"Cash on deposit, £100.

"F. J. MERCER,

"Witness, DAVID NUTT.

"ROBERT BULLEN."

The paper mentioned in the said contract as the "In-

ventory annexed," was a partly written and partly printed paper, of which a copy accompanies this case, and is to be taken as part thereof. It was signed and annexed by the defendant to the said contract at the time when the letter was signed by him. The paper was as follows:—

"FOR SALE, BY PRIVATE CONTRACT,
The fine Teak-built Barque

INTREPID, A 1, 286½ TONS REGISTER.

Built under particular inspection at Coringa in the year 1842, of the best materials; shifts without ballast, carries a good cargo, has a poop and excellent height between decks, and is well adapted for a passenger ship. Length, 91½ ft.; breadth, 22 ft. 8 inches; depth, 16 ft. 8 inches.

NOW LYING IN THE ST. KATHARINE DOCKS.

Hull, Masts, Yards, Standing and Running Rigging, with all faults as they now lie.

INVENTORY.

(Signed) ROBERT BULLEN.	ANCHORS.	BOATSWAIN'S STORES.	SHIP CHANDLER'S STORES.	COOK & CABIN STORES.
	1 Best Bower.		5 Brass Compasses.	1 Hearth.
	1 Small ditto. &c.	1½ Coils new rope. &c., &c.	1 Barometer (a). &c., &c.	&c., &c.
	CABLES.	GUNNER'S STORES.	COOPER'S STORES.	PROVISIONS.
	1 Bower. &c., &c.	13 Boarding pikes &c., &c.	4 Butts. &c., &c.	&c., &c.
	SAILS.			BOATS.
	1 Flying jib. &c., &c.			&c., &c.

The iron kentledge on board is not sold with the ship, being the property of the St. Katharine Dock Company.

The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever.

For Inventories and further Particulars, apply to
J. H. ARNOLD,
3, Clement's Lane, Lombard Street, London."

The signature of the defendant in the margin thereof was in the place there indicated.

On the 27th of July a bill of sale of the said ship was duly executed.

(a) This was in writing.

1850.
TAYLOR
v.
BULLEN.

1850.

TAYLOR
v.
BULLEN.

The plaintiff's point for argument was, that the documents set out and referred to in the case constituted a warranty of the ship, in the terms of the first count of the declaration. The contrary was maintained by the defendant.

Cowling, for the plaintiff.—The plaintiff is entitled to retain the verdict. The ship was sold “agreeable to the inventory annexed,” which means the whole document, including the advertisement, and not merely that part which contains the list of stores. The entire document is embodied in the contract of sale, and amounts to a warranty. [*Pollock*, C. B.—The defendant merely describes the vessel as teak-built, and states that she is to be taken with all her faults, but that he will not warrant her.] It is submitted, that the true meaning of the document is, that the vessel is to be taken with all faults consistent with her being a teak-built ship. [*Parke*, B.—Suppose the defendant had wished to relieve himself from all responsibility, what other words could he have used, unless he had said in express terms “I will not warrant?”] *Shepherd v. Kain* (a) is an authority in point. There an advertisement for the sale of a ship described her as “a copper-fastened vessel,” adding that she was to be taken with all faults, without any allowance for any defects whatsoever; and it appeared that she was only partially copper-fastened: and it was held, that, notwithstanding the words “with all faults, and without allowance for any defects whatsoever,” the vendor was liable for the breach of warranty. The Court there said, “The meaning of the advertisement must be, that the seller would not be responsible for any faults which a copper-fastened ship may have. Suppose a silver service sold ‘with all faults,’ and it turns out to be plated; can there be any doubt that the vendor would be liable? ‘With all faults’ must mean with all faults which it may have consistently with its being the thing

(a) 5 B. & Ald. 240.

described." The facts of that case appear more fully in the subsequent case of *Kain v. Old* (a), which was an action on a warranty of the same vessel. There indeed the plaintiff failed, because the document relied on as the instrument of contract was void by the 34 Geo. 3, c. 68, s. 14; but nothing was said by the Court to invalidate the previous decision in *Shepherd v. Kain*. In *Freeman v. Baker* (b), which was an action for falsely representing a ship to be copper-fastened, the contract of sale provided, that, "on payment of the purchase-money, the said brig, with what belongs to her, shall be delivered *according to the inventory which hath been exhibited*; but the said inventory shall be made good as to quantity only; and the said brig, together with her stores, shall be taken with all faults, in the condition they now lie, without any allowance for weight, length, quantity, or any defect whatsoever;" and it was held that the word "inventory" referred only to the list of stores. But, whatever it referred to, the language of the contract excluded any warranty except as to quantity. In *Pickering v. Dowson* (c), it was assumed that the inventory included the description of the vessel; and the case was decided on the ground, that the contract of sale made no reference to the inventory.

1850.
TAYLOR
v.
BULLEN.

Barstow, for the defendant.—Looking at the case apart from authority, the very terms of the contract exclude any warranty. The agreement refers only to that part of the printed paper which is described as an "inventory," and which mentions the list of stores. The defendant signs the paper for the purpose of identifying it as the inventory referred to in the contract of sale, not for the purpose of adopting the whole; and his signature is against that part which is described as an inventory. The words "one barometer" being written, not printed, a signature was necessary as a guarantee of its correctness. Further, the authorities support the defendant's view.

(a) 2 B. & C. 627. (b) 5 B. & Ad. 797. (c) 4 Taunt. 779.

1850.

TAYLOR
v.
BULLEN.

The case is not distinguishable from *Freeman v. Baker*. In *Shepherd v. Kain* the words were without allowance for any "defects." Here the defendant has expressly guarded against any warranty, by inserting the word "errors."

Cowling replied.

POLLOCK, C. B.—The defendant is entitled to judgment. The action is for a breach of warranty, and the question is, whether, under the circumstances, the defendant gave any warranty at all. The present case is distinguishable, in some of its features, from every other case to which our attention has been drawn in the course of the argument. Assuming that the whole of the paper in which the inventory is comprised, is to be attached to the contract, it is expressly stated, that "the vessel and her stores are to be taken with all faults, as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." Mr. *Cowling* relied chiefly on the case of *Shepherd v. Kain*, an authority which I have no desire to impeach. Substantially, it was there held, that if a ship is sold as a copper-fastened vessel, "to be taken with all faults," that means with all such faults as being a copper-fastened vessel it may have; and that if it be not a copper fastened vessel, the warranty is broken. Here the vessel is "to be taken with all faults," "without any allowance for any defect or error whatever." Now, when the defendant distinctly says, that he will warrant nothing, but describes the vessel as teak-built, that description is either fraud or error. If fraud, the plaintiff has another remedy; if error, all liability in respect of it is excluded by the terms of the contract. The real meaning of the contract is this: "There is a vessel now lying in Saint Katherine's Docks, I describe her as being the 'Intrepid,' A 1, and call her a teak-built barque; but I expressly give you notice that I do not mean to warrant anything; I point out what I mean, go and look at the inventory of stores, examine and judge for yourself, but understand, that you

must take her with all her faults, and without allowance for any defect or error whatever." That is a distinct declaration, that the defendant will warrant nothing; and we therefore give effect to the spirit of the contract, by holding this no warranty.

1850.
TAYLOR
v.
BULLEN.

PARKE, B.—I am of the same opinion. The question is, whether the averment in the first count of the declaration, that the defendant warranted the ship to be teak-built, A 1, and adapted for a passenger ship, was proved. The proof given was, that the defendant subscribed an agreement and inventory attached, by which he agreed "to sell the bark 'Intrepid' as she now lies in the St. Katherine's Dock, agreeable to the inventory annexed." The points for our consideration are, whether the inventory is embodied in the contract; and, if so, whether there is any warranty. Mr. *Barstow* insisted, that the case did not differ from *Freeman v. Baker*, and that the defendant's intention was merely to incorporate in the contract of sale the description of the ship's stores in the inventory. But this is a stronger case, to shew that the parties meant to import into the contract something which would answer the description in the inventory as well of the vessel as of the list of stores, for, the inventory being attached to the agreement, the defendant has signed the inventory. It was argued, that that is explained by the insertion of the words "one barometer" in writing. I cannot, however, help thinking, though on the whole I have some doubt, that the parties meant to contract that the vessel should be sold according to the terms of the inventory. The question then turns on the effect of the memorandum, viz. "The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." If the language had been solely "any defect whatever," *Shepherd v. Kain* is an authority, that it must be construed with reference to defects which it

1850.

TAYLOR
v.
BULLER.

may have consistently with its being the thing described. But then we find the word "error," which has been introduced for further protection; and I cannot put any construction upon that word, except that of "unintentional misdescription." According to the contract, it must be a "barque" that is sold; but if there is any involuntary misdescription of such a vessel, that is covered by the word "error." The term "error," when used with reference to the purchase of real estate, has been construed to mean a misstatement or misdescription erroneously and not wilfully introduced: *The Duke of Norfolk v. Worthy* (a), *Wright v. Wilson* (b). So, in this case, I construe the word "error" to mean any "unintentional misdescription." It seems to me therefore, though I had some doubt in the course of the argument, that, looking at the particular language of the inventory, this is a misdescription of the vessel which comes within the term "error," and consequently that there is no warranty.

ALDERSON, B.—I am of the same opinion. The contract of sale has reference to the paper annexed to it, and the whole of the latter is to be treated as one paper, and as part of the bargain. The contract is in effect this, "I agree to sell you the bark 'Intrepid' as she now lies in St. Katherine's Dock, agreeably to an inventory which I have annexed, and which contains a description of the barque, as well as a description of her stores." According to the best English writers, the word "inventory" includes a description of a person as well as of those parts of his dress or other matters which are particularly specified. Thus Shakespeare speaks of a lady being inventoried:—"I will give out divers schedules of my beauty: it shall be inventoried, and every particle and utensil labelled to my will" (c). Then treating the description of the vessel as part of the inventory, there is attached to the

(a) 1 Camp. 340.

(b) 1 Moo. & Rob. 207.

(c) Twelfth Night, Act 1, Scene 5.

whole document a stipulation that there shall be no allowance for any defect or error. What is this but an error in the description. The vessel is described as teak-built, and it turns out that she is not teak-built. I agree with the authority of *Shepherd v. Kain*. That case only decided that the sale of a vessel as a copper-fastened vessel to be taken with all faults, meant with all faults consistent with her being a copper-fastened vessel, and that consequently the vendee was not bound to accept a vessel not copper-fastened. This case is totally different, for here there is an express provision, that the vendor shall not be responsible for any error whatever.

1850.
TAYLOR
v.
BULLEN.

Judgment for the defendant.

SKINNER v. THE LONDON, BRIGHTON, AND SOUTH COAST RAILWAY COMPANY. Nov. 8.

CASE.—The declaration stated, that the plaintiff, at the request of the defendants, became and was a passenger in one of their carriages, being one of a train of carriages of the defendants drawn by a locomotive engine of the defendants, to be by them safely and securely carried and conveyed from Brighton to London, for reasonable reward to the defendants in that behalf; and the defendants then received the plaintiff as such passenger as aforesaid; and thereupon it then became and was the duty of the defendants to use due and proper care and skill in

A declaration against a railway Company stated, that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried from &c., for reward to them, &c.; that, through the carelessness, negligence, and improper conduct

of the defendants, the train in which the plaintiff was such passenger, struck against another train, whereby the plaintiff was injured. At the trial, it appeared, that the train in question had been hired of the Company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one; and that the accident was occasioned by the train in which the plaintiff was, running against a train standing at the station, it being then dark:—*Held*, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants. Secondly, that there was evidence for the jury that the plaintiff was a passenger to be carried by the defendants.

1850.
SKINNER
v.
LONDON,
BRIGHTON, AND
SOUTH COAST
RAILWAY CO.

and about the carrying and conveying the plaintiff on the said journey. Averment, that the defendants did not use due or proper care or skill, &c.; by reason whereof, and by and through the mere carelessness, negligence, and improper conduct of the defendants and of their servants in that behalf, the train of carriages in which the plaintiff was such passenger as aforesaid, and the locomotive engine then drawing the same, with great force and violence ran and struck against a certain other train of carriages, then being on and upon the said railway, whereby the plaintiff was injured, &c.

Pleas, first, not guilty; secondly, that the plaintiff did not become nor was a passenger to be carried and conveyed, &c., *modo et formâ*. Upon which issues were joined.

At the trial, before *Pollock*, C. B., at the Sittings after last Trinity Term, it appeared, that, on the occasion in question, the treasurer of a benefit society, called "The Printers' Pension Society," had, on their behalf, hired of the defendants a train for the purpose of an excursion from London to Brighton and back, on the terms that the defendants were to receive a certain sum for the train; but that, if more than a particular number of persons were carried, the defendants were to be paid a larger amount. The tickets for the excursion were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one. On the return from Brighton to London, it being then dark, the train in which the plaintiff was ran into another train which had stopped a short distance from the station, in consequence of a luggage train before it having broken down. It was objected, on the part of the defendants, that there was no evidence that the plaintiff was a passenger to be carried by the defendants for hire; but the learned Judge overruled the objection, reserving leave for the defendants to move to enter a nonsuit on that ground. In summing up, his

Lordship left it to the jury to say, whether the plaintiff was a passenger as alleged, and he also told the jury that the fact of the accident having occurred was of itself *primâ facie* evidence of negligence on the part of the defendants, referring to the ruling of Lord *Denman*, C. J., in *Carpue v. The London and Brighton Railway Company*(a). The jury having found a verdict for the plaintiff on both issues,

1850.
SKINNER
v.
LONDON,
BRIGHTON, AND
SOUTH COAST
RAILWAY CO.

Bramwell now moved for a new trial, on the ground of misdirection, and also to enter a nonsuit on the point reserved.—First, the effect of the learned Judge's direction was to cast the onus probandi on the wrong party. The plaintiff complains of negligence, and therefore he is bound to prove it; and for that purpose it is not enough to shew that an accident in fact happened, but he ought further to prove, that the accident was the result of the defendants' negligence. [*Pollock*, C. B.—Surely the fact of a collision between two trains belonging to the same Company is *primâ facie* some evidence of negligence on their part. *Alderson*, B.—This is not the case of a collision between two vehicles belonging to different persons, where no negligence can be inferred against either party, in the absence of evidence as to which of them is to blame. But here all three trains belong to the same Company; and whether the accident arose from the trains running at too short intervals, or from their improper management by the persons in charge of them, or from the servants at the station neglecting to stop the last train in time, the Company are equally liable; and it is not necessary for the plaintiff to trace specifically in what the negligence consists; and if the accident arose from some inevitable fatality, it is for the defendants to shew it.]—Secondly, the facts proved do not support the allegation

(a) 5 Q. B. 751.

1850.
 SKINNER
 v.
 LONDON,
 BRIGHTON, AND
 SOUTH COAST
 RAILWAY CO.

that the plaintiff, at the request of the defendants, became a passenger in their train for reasonable reward to them. The contract of the plaintiff was with "The Printers' Pension Society," not with the defendants. [*Alderson, B.*—The Company, by giving their tickets to the treasurer of the society to distribute, constitute him their agent to contract with those who take the tickets; at all events, that was a question for the jury, and they have found for the plaintiff.]

PER CURIAM (a).—We are all of opinion that there was evidence for the jury on both points, and there will, therefore, be no rule.

Rule refused.

(a) *Pollock, C. B., Alderson, B., Platt, B.*

Nov. 8.

THE ATTORNEY-GENERAL v. ROBSON.

The owner of a vessel, who knowingly lets it for the purpose of fetching goods to be landed without payment of duty, is, if the goods are so landed, liable to penalties under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of goods.

THIS was an information under the 8 & 9 Vict. c. 87, s. 46 (a), charging the defendant with being concerned in

the illegal unshipping of goods to be landed without payment of duty, is, if the goods are so landed, liable to penalties under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of goods.

(a) That section enacts: "That every person who shall, either in the United Kingdom or the Isle of Man, unship, or assist, or be otherwise concerned in the unshipping of any goods which are prohibited to be imported into the United Kingdom or into the Isle of Man, or the duties for which have not been paid or secured, or who shall knowingly harbour, keep, or conceal, or shall knowingly permit or suffer to be harboured, kept, or concealed, any goods which shall have been ille-

gally unshipped without payment of duties, or which shall have been illegally removed without payment of the same from any warehouse or place of security in which they may have been deposited, or any goods prohibited to be imported, or to be used or consumed in the United Kingdom or in the Isle of Man; and every person, either in the United Kingdom or in the Isle of Man, to whose hands and possession any such prohibited or uncustomed goods shall knowingly come, or who

the illegal unshipping of tobacco, the duties for which had not been paid.

1850.
ATT.-GEN.
"ROBSON.

At the trial, before *Pollock*, C. B., at the Middlesex Sitings after last Trinity Term, it appeared that the defendant was the owner of a vessel, which he had let on a voyage from Newcastle to Scheveling, well knowing that the object of the voyage was to fetch tobacco, and run the same at Yarmouth. In order to carry out the scheme, the defendant had cleared the vessel in question at Newcastle, as for a voyage with coals to Yarmouth; but the captain sailed direct to Scheveling under the guidance of a pilot sent on board by the charterers with the knowledge of the defendant. The defendant was at Yarmouth when the vessel arrived there from Scheveling with the cargo of tobacco, and, after it had been run, complimented the captain on the clever way in which he had managed the matter. The defendant received 200*l.* for the use of the vessel. Upon these facts it was submitted on the part of the defendant, that he was not guilty of the offence charged; but the learned Judge ruled otherwise, and a verdict was found for the Crown, with 8000*l.* penalties.

Bramwell now moved for a new trial on the ground of misdirection.—The defendant was not concerned in the unshipping of the tobacco, though the purpose for which the vessel was hired might have been known to him. A person who merely affords to others the means of doing a particular act cannot be said to do it himself. The defendant took no part in the running of the tobacco, and in fact his interest in the transaction ceased, when the vessel arrived at Yarmouth. [*Pollock*, C. B.—Suppose an

shall assist or be in anywise concerned in the illegal removal of any goods from any warehouse or place of security, in which they shall have been deposited as afore-

said, shall forfeit either the treble value thereof, or the penalty of 100*l.*, at the election of the Commissioners of Her Majesty's Customs."

1850.
 ATT.-GEN.
 v.
 ROSSON.

indictment for conspiracy, could it have been said that he was not an associate in the transaction? The words "otherwise concerned" mean having any interest whatever in the matter. *Alderson*, B.—Perhaps it might not be said that the defendant "assisted," but he was certainly "concerned" in the unshipping.]

PER CURIAM.—There will be no rule (a).

Rule refused.

(a) *Pollock*, C. B., *Alderson*, B., and *Platt*, B.

Nov. 15.

JEFFRIES and Others v. WILLIAMS.

A declaration in case stated that certain messuages and closes were in the occupation of the tenants of the plaintiffs, the reversion thereof belonging to them, and that the defendant so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support, worked certain mines, and dug and got the minerals out of

the mines near to the said messuages and closes; that thereby the foundations of the messuages were injured, and, in consequence thereof, large portions of the buildings fell down, and the ground on which the buildings stood swagged and gave way:—*Held*, first, on motion in arrest of judgment, that the declaration was good, although it contained no averment that the plaintiff had a right to have the messuages supported by the soil under which the defendant got the mines; for, as it was neither alleged nor could be inferred, that the soil in which the mines were, was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the defendant was *prima facie* a wrong doer; and therefore, as against him, the declaration disclosed a sufficient title.

Secondly, that, as the defendant did work the mines without leaving sufficient support to the plaintiff's buildings and land, they were entitled to a verdict on the plea of not guilty; for, if any circumstance justified the defendant in getting the minerals without leaving sufficient support, that should have been pleaded by way of confession and avoidance.

tiguous to and under the said messuages, buildings, and closes of land, and by reason of the premises the foundations of the said messuages and buildings were then greatly weakened and injured, and in consequence thereof large portions of the said messuages and buildings became prostrate, cracked, injured, and wholly uninhabitable, and the ground on which the said messuages and buildings stood, and the said closes, greatly swagged and gave way, and the said messuages and buildings and closes became utterly useless and of no use or benefit to the plaintiffs.—The defendant pleaded, first, “not guilty;” secondly, a denial that the reversion belonged to the plaintiffs; thirdly, a special plea not material to the present question.

At the trial, before Lord *Campbell*, C. J., at the last Warwickshire Spring Assizes, it appeared that the buildings in question consisted of six cottages, which were in the occupation of the plaintiffs’ tenants; and that, previously to the accruing of the plaintiffs’ title, the defendant, who had a right to the mines under the cottages and land, had excavated the soil underneath the cottages, but that no damage had been thereby done either to the cottages or to the surface land. Subsequently, however, and whilst the plaintiffs had the reversion, the defendant had worked one of the veins of coal for ten yards, and another lower one, one yard from the plaintiffs’ land, which excavations, in consequence of the support of the plaintiffs’ land having been previously weakened by the defendant’s former excavation, occasioned the houses to crack, and the surrounding land to sink. The jury found that the defendant had not excavated *under* the land since the plaintiffs had become entitled to the reversion; but they found that the houses had been injured and the soil had sunk in consequence of the above excavation near to the plaintiffs’ land. A verdict was found for the plaintiffs on all these pleas, the learned Judge reserving leave for the defendant to move to enter a nonsuit, or a verdict for the defendant.

1850.
JEFFRIES
v.
WILLIAMS.

1850.
 {
 JEFFRIES
 v.
 WILLIAMS.

Whitehurst, in the following Term, obtained a rule nisi accordingly, and also to arrest the judgment; against which

Humfrey and *Mellor* shewed cause in last Trinity Vacation, (June 18 and 19).—The plaintiffs are entitled to retain the verdict. The defendant was guilty of negligence in law by excavating *near* the plaintiffs' land without leaving sufficient support for the surface. The plaintiffs' right is not in the nature of an easement having its origin in grant, but a right coeval with the right of property itself, and depending on the maxim "sic utere tuo ut alienum non lædas." Therefore this case is distinguishable from *Partridge v. Scott* (a) and *Wyatt v. Harrison* (b), which proceeded on the ground that the owner of land has no right to load his own soil so as to make it require the support of that of his neighbour, unless he has some grant to that effect. Besides, in *Partridge v. Scott*, the plaintiff built his house on excavated ground, here the defendant had already excavated the soil underneath the plaintiffs' houses, so that the inevitable consequence of the act complained of was to disturb the surface. In *Gale on Easements* (c) it is said, "It may be suggested that there are cases in which, though the house be modern, damages may be recovered for an injury done to it by digging too near the common boundary. If the owner establishes his right to support for his soil, and the jury should be of opinion that the land would have fallen in in consequence of the digging, even had no additional weight been imposed by building, the value of the house falling with the land might, it seems, be recovered as damages resulting from the principal injury." [*Parke*, B.—That adopts the distinction pointed out in 2 Roll. Abr. 564, "Trespass" (L.), pl. 1 (d).] Numerous

(a) 3 M. & W. 220.

(b) 3 B. & Ad. 871.

(c) Page 225, 2nd edit.

(d) The passage is as follows:

—"If A. be seised in fee of copyhold land next adjoining the land

1850.
 }
 JEFFRIES
 v.
 WILLIAMS.

authorities have established that a person is liable for an act done by him in using his property, whereby the rights of another are injured, unless such act be altogether inevitable and beyond his control. Thus, in *Turbeville v. Stamp* (a), which was an action against the defendant for so negligently and carelessly keeping the fire in his field, that it communicated to the plaintiff's adjoining close of heath, and burnt it. After verdict for the plaintiff, the defendant moved in arrest of judgment, and it was said, "that, in fact, in this case the defendant's servant kindled this fire by way of husbandry, but that a wind and tempest rose and drove it into the plaintiff's field." The Court, however, said, "The fire in his field is his fire, as well as that in his house. He made it, and must see it does no harm; and answer the damage, if it does. Every man must use his own so as not to hurt another: but if a sudden storm had arisen which he could not stop, it was matter of evidence, and he should have shewn it." Also, in *Sutton v. Clarke* (b), *Gibbs*, C. J., observes, "that where an individual for his own benefit makes an improvement on his own land according to his best skill and diligence, and not foreseeing it will produce any injury to his neighbour; if he thereby unwittingly injure his neighbour, he is an-

of B., and A. erect a new house on his copyhold land, and some part of the house is erected on the confines of his land next adjoining the land of B.; if B. afterwards digs his land so near the foundation of A's house (but no part of the land of A.), that thereby the foundation of the house and the house itself falls into the pit, yet no action lies by A. against B., because it was A.'s own fault that he built his house so near B.'s land; for he by his act cannot hinder B. from making the best

use of his own land that he can. *Pasch. 15 Car. B. R.*, between *Wilde and Minsterley*,—by the Court, after a verdict for the plaintiff. But, *semble*, that a man who has land next adjoining my land, cannot dig his land so near mine that thereby my land shall go into his pit; and therefore, if the action had been brought for that, it would lie."

(a) 1 *Ld. Raym.* 264; 1 *Salk.* 13.

(b) 6 *Taunt.* 29.

1850.
 {
 JEFFRIES
 v.
 WILLIAMS.

swerable." The authority of *Turbeville v. Stampe* was expressly adopted by the Court of Common Pleas in *Vaughan v. Menlove* (a), which decided, that case lies against a man for negligently and improperly keeping a stack of hay put together in such a state as to be likely to ignite, and which eventually does ignite, and his neighbour's premises are thereby injured (b). In *Harris v. Ryding* (c) the owner in fee demised the land, reserving to himself the mines, and it was held, that he was not entitled to take all the mines, but only so much as he could get, leaving a reasonable support to the surface. There it appears to have been admitted, that there existed the natural easement of support for the upper soil from the soil beneath, and, therefore, the entire removal of the inferior strata, however done, would be actionable, if productive of damage, by withdrawing that degree of support to which the owner of the surface was entitled: Gale on Easements, p. 266. In Selwyn's *Nisi Prius* (d) reference is made to a case of *Stansell v. Jollard*, in which Lord *Ellenborough* held, "that where a man had built to the extremity of his soil, and had enjoyed his building above twenty years, upon analogy to the rule as to lights, &c., he had acquired a right to a support, or as it were of leaning to his neighbour's soil, so that his neighbour could not dig so near as to remove the support; but that it was otherwise of a house &c. newly built." But it is unnecessary to consider the effect of those cases in which the action could not be maintained without alleging an easement, because here the plaintiffs complain of an injury to their natural right, viz. that the defendant should so use his property as not to injure his neighbour's. [They also cited *Hilton v. The Earl of Granville* (e), and *Broadbent v. Wilks* (f).

(a) 4 Scott, 244; 3 Bing. N.C. 468.

(b) But see 14 Geo. 3, c. 78, s. 86.

(c) 5 M. & W. 60.

(d) Vol. 1, p. 435, 10th edit.

(e) 5 Q. B. 701.

(f) Willea, 360.

Whitehurst, who appeared in support of that rule, was stopped by the Court; who called upon

1850.
JEFFRIES
v.
WILLIAMS.

Humfrey and *Mellor* to shew cause against the rule to arrest the judgment.—The words “and under” being now considered as struck out of the declaration, enough remains to support the action. The case falls within the rule as stated by Lord *Tenterden*, in delivering the judgment of the Court in *Wyatt v. Harrison* (a), viz. “It may be true, that if my land adjoins that of another, and I have not by building increased the weight upon my soil, and my neighbour digs in his land so as to occasion mine to fall in, he may be liable to an action.” Though the title be defectively stated, after verdict it will be presumed that everything was proved which was necessary to maintain it: *Stennel v. Hogg* (b). The declaration alleges, that the defendant carelessly and negligently excavated his own ground, and thereby injured the plaintiffs’ houses. *Dodd v. Holme* (c) is an express authority that under those circumstances the defendant is liable. There, indeed, the declaration alleged that the plaintiff’s house was an *ancient* dwelling-house; but the judgment of the Court did not proceed on that ground. [*Parke*, B.—Neither in *Smith v. Martin* (d) nor in *Slingsby v. Barnard* (e) did the declaration state any right to support from the adjoining soil.]

Whitehurst and *Hayes*, in support of the rule.—The maxim referred to means “so use your own property as not to injure *the rights* of your neighbour.” On this declaration it must be taken that the plaintiffs are the owners of the houses, and the defendant the owner of the soil, then what duty is cast on him to support the surface? A party confining himself within the limits of his own

(a) 3 B. & Ad. 871.

(b) 1 Wms. Saund. 220.

(c) 1 A. & E. 493.

(d) 2 Saund. 394.

(e) 1 Roll. 430.

1850.
 JEFFRIES
 v.
 WILLIAMS.

property may deal with it as he will. If he dig a pit, he is not bound to put a fence round it to keep trespassers from falling into it: *Gale on Easements* (a), *Blyth v. Topham* (b), 1 Roll. Abr. 88, "Action sur Case" (N.) pl. 4. *Brown v. Windsor* (c) was expressly decided on the ground that an easement was both alleged and proved. Here the declaration does not state that the plaintiffs had a right to have their houses supported by the soil which the defendant excavated, nor is there any allegation from which such a right can be inferred. The case therefore falls within the principle of the decisions in *Chadwick v. Trower* (d) and *Peyton v. The Mayor of London* (e). [They also referred to *Smith v. Kenrick* (f).]

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—This case came before the Court (g) at the Sittings after last Term, on a motion for a new trial. It was an action on the case by the plaintiffs as reversioners, for an injury done to six houses in the possession of their tenants. The declaration stated, that certain messuages, &c. [His Lordship stated the declaration and pleas.] On the trial before Lord Campbell, C. J., at Warwick, it was admitted, that the two last pleas must be found for the plaintiffs, and the question between the parties arose on the plea of not guilty. It appeared, that the six cottages, which were in possession of the plaintiffs' tenants, had been seriously injured by the defendant's making mines under the cottages and near to them; but no mines had been worked under the cottages whilst the reversion belonged to the plaintiffs. They had ceased to be worked in

(a) Page 265, 2nd edit.

(b) Cro. Jac. 158.

(c) 1 C. & J. 20.

(d) 6 Bing. N. C. 1.

(e) 9 B. & C. 725.

(f) 7 C. B. 515.

(g) Parke, B., Alderson, B.,
 Rolfe, B., Platt, B.

the time of their father, the former proprietor; but, whilst the plaintiffs had the reversion, the defendant had worked one of the veins of coal ten yards, another lower one one yard from the plaintiffs' soil, and this working the jury found to have been the cause of the damage. There was evidence, that the mines were worked in a proper way, according to the practice of miners, and with reference to the interests of the coal owners, but that sufficient props were not placed, or ribs of coal left, to support the surface. Indeed, there was no mode of working such veins of coal in such a soil, so as to make the surface safe, and prevent it from what is termed swagging. The jury found on the plea of not guilty for the plaintiffs; but my Lord Chief Justice reserved the question, whether, under these circumstances, the action could be maintained, and gave leave to move to enter a nonsuit.

As to the charge of working the mines *under* the cottages, it is clear that must fail, as no such working was proved while the plaintiffs were entitled to the reversion. Whether the other plea, the third, ought not to have been partially found for the defendant, it is not worth while to inquire. The residue of the charge is, that the defendant worked the mines near and contiguous to the cottages and closes of the plaintiffs. There do not appear to have been any closes except the site of the cottages, but there was no working "contiguous," that is, "so near as to touch" that site, but there was *near* to the site, and so near that the working in that place, and the mining of the coal there, caused damage to the cottages. The question, therefore, is, whether the residue of the declaration, that is, that part of the declaration, is good in law, and what should be the verdict on the plea of not guilty.

The allegation is, that the defendant wrongfully, carelessly, negligently, and improperly, without leaving any proper or sufficient support in that behalf, worked the mines, and dug and got the minerals out of the mines near

1850.
JEFFRIES
v.
WILLIAMS.

1850.

JEFFRIES
v.
WILLIAMS.

to the said messuages and closes, the reversion of which was the plaintiffs, whereby the foundations of the said messuages and buildings were greatly injured, and in consequence thereof large portions of the messuages and buildings fell down, and were rendered uninhabitable, and the ground on which the buildings stood swagged and gave way, and they were rendered less valuable, and the plaintiffs injured in their reversionary interest. We think this part is good. The objection to it is, that there is no allegation, that the plaintiffs had any right to have the messuages supported by the soil under which the defendant got the mines; and if it had appeared in the declaration, that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the objection would have been fatal, because, arguing against a person having the right to the adjoining soil, or claiming under one that had all the right to interfere with the soil, it would be necessary for the plaintiffs to shew a title to the support of the soil, according to the doctrine laid down in *Wyatt v. Harrison* (a). But if the defendant is not stated in the declaration to have any such right, and is therefore *prima facie* a wrongdoer, the declaration, it seems to us, would be sufficient. If a house is *de facto* supported by the soil of a neighbour, this appears to us to be sufficient title against any one but that neighbour, or one claiming under him. Just as one who should prop his house up by a shore resting on his neighbour's ground, would have a right of action against a stranger, who, by removing it, causes the house to fall; but none against his neighbour, or one authorised by the neighbour to do so, if he took it away and caused the same damage: and this explains why there was no allegation of the right to the support of the adjoining soil in the case of *Smith v. Martin* (b); whereas, when the defendant appeared to be the owner of the ad-

(a) 3 B. & Ad. 871.

(b) 2 Saund. 394.

joining soil, the declaration was held bad for want of the allegation of a right, as in *Wyatt v. Harrison and Peyton v. Mayor of London* (a).

1850.
 JEFFRIES
 v.
 WILLIAMS.

Now, in this case, the defendant must be taken to be a wrongdoer, for he is not stated in the declaration to be the occupier or owner of the adjoining land, or to have under him all the rights that he has to mine and dig there, nor can either of these facts be collected by inference from the averments in it; at the most it may be conjectured, that the plaintiffs do not mean to dispute that he had *some right* of mining, though, even that is not to be necessarily inferred, as the plaintiffs only allege that the defendant carelessly (that is, with respect to the plaintiffs' dwelling houses), and without leaving a sufficient and proper support for them and their land, got the minerals and caused the houses to fall, without admitting or denying that he had any right to do what he did.

The declaration being good in this respect, the only question on "not guilty" was, whether it was proved; and as the defendant did work the mines without taking due care not to do damage to the plaintiffs' houses, and without leaving a sufficient or proper support for them, the plaintiffs are entitled to a verdict. It is not a question whether he conducted himself properly with respect to the owner of the surface if he claims the mines under him, or, if he himself was the owner of the surface and the mines, whether he acted carelessly or improperly with regard to his own interests. If he had the soil of the adjoining land himself, and in consequence a right to dig to the extremity of it, so that he left all the support which the plaintiffs' soil was entitled to in its natural state without being weighted by the plaintiffs' houses, or if he had a right to get the mines, derived from the owner of the adjoining land, with all his rights of excavating and getting the minerals, or if he had a right of getting the minerals which he had derived under

(a) 9 B. & C. 725.

1850.
 JEFFRIES
 v.
 WILLIAMS.

the owner of both the plaintiffs' land and the land adjoining, without leaving a sufficient support to the surface, with or without houses on it, he should have confessed the allegations in the declaration, including the insufficiency of the support, and excused them. Whether the defendant really had any justification for so getting the minerals, as to leave no sufficient support to the plaintiffs' land and buildings, does not appear from my Lord Chief Justice's note. Upon these pleadings, the plaintiffs were clearly entitled to recover. We think, therefore, that the rule must be absolute to enter the verdict for the defendant on the plea of not guilty, so far as relates to working the mines and getting the minerals *under* the plaintiffs' buildings and land, and that the residue of the rule must be discharged.

Rule accordingly.

Nov. 18. SIMS and Others, Executors of THOMAS ABERNETHIE, v.
 ROBERT BRUTTON and JOHN CLIPPERTON.

ASSUMPSIT by the plaintiffs as executors of Thomas Abernethie.—The first count was for money lent, money In March, 1832, the defendants B. and C., who were then in partnership as solicitors, were employed by A. to lay out 500*l.* on mortgage. They lent the money to L. on the mortgage of certain premises, and retained possession of the mortgage-deed. The premises were afterwards sold subject to the mortgage, and the purchaser paid C. the 500*l.* and interest, but without the knowledge of B., and the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any conveyance or receipt executed or signed by A., who was not informed that the money had been paid. In December, 1832, C., without the knowledge of B., returned to the purchaser 300*l.*, and received back the mortgage-deed, and no part of the 500*l.* was paid to A. Interest, at first on the 500*l.*, and then upon the 300*l.*, was paid to C. by the purchaser; and entries were made in the books of the defendants, giving credit to A. for interest on the 500*l.*, and debiting him with interest paid to his agent. In July, 1838, the defendants dissolved partnership. Up to the dissolution, interest on the 500*l.* was regularly paid to the agent of A. by C., by cheques drawn by the defendants on their bankers; and, after the dissolution, it was paid by C., sometimes in cash and sometimes by cheques on his own banker. In some of the receipts the money was described as interest upon a mortgage. A. died in May, 1840. In December, 1846, the purchaser paid C. the 300*l.* and interest, and received from him the mortgage-deed. B. was ignorant of the receipts and payments subsequent to the investment of the 500*l.*, until 1849. In 1848, the plaintiffs, the executors of A., first discovered that the mortgage-money had been repaid:—*Held*, that, under the above circumstances, the Statute of Limitations was a bar to the action; also, that no action would lie against B., inasmuch as the subsequent receipt of the mortgage-money by C. was wholly unauthorised, and not within the scope of the partnership business.

had and received, interest, and on an account stated, laying the promise to the deceased. The second count was similar, laying the promise to the executors. The third count was for money had and received to the use of the plaintiffs as executors, and for interest, and on an account stated with them as executors.

The defendant Brutton pleaded non assumpsit and the Statute of Limitations. The other defendant allowed judgment to go by default.

By consent, the following case was stated for the opinion of this Court:—

In March, 1832, the defendants were acting as attornies and solicitors of the said Thomas Abernethie, and were then practising in partnership together as attornies and solicitors at their offices in New Broad-street, in the city of London.

In March, 1832, T. Abernethie applied to the defendant Brutton to obtain for him an investment of 500*l*. on mortgage of good security; and Brutton informed him he had procured such investment; and he remitted in March, 1832, to the defendant Brutton (which was paid into his own hands) the sum of 500*l*., to be by them the said Brutton and Clipperton, as the attornies and solicitors of T. Abernethie, invested on mortgage.

The said sum of 500*l*. was paid by Brutton into Messrs. Whitmore & Co.'s banking-house in March, 1832, and placed to the joint account of the defendants; and the said sum of 500*l*. was lent by them, pursuant to the said retainer, to one John Lane, for the said T. Abernethie, on mortgage of certain premises at Camden Town, in the county of Middlesex. The mortgage deed was dated the 8th of March, 1832, and was in the usual form; and was executed by the said J. Lane to secure the repayment of the 500*l*. The defendants retained possession of the deed. The property was afterwards sold, subject to the mortgage, to Henry Handford.

1850.
Sims
v.
BRUTTON.

1850.
Sims
v.
Brutton.

On the 16th of September, 1834, being after the said sale, the said H. Handford paid into the hands of the defendant Clipperton, at the office of the defendants, the said sum of 500*l.*, with the interest due thereon, but without the actual knowledge of the defendant Brutton. The deed was given up by the defendant Clipperton to the said H. Handford, but no receipt was indorsed thereon, nor was any reconveyance or deed or receipt signed or executed by the said T. Abernethie, who was not informed that the said sum had been paid.

On the 19th of December, in the same year, the said H. Handford applied to the defendant Clipperton for a return of 300*l.*, part of the 500*l.* he had so paid off, who, without the actual knowledge of the defendant Brutton, returned to the said H. Handford 300*l.*, and received back the said mortgage deed, and no part of the said 500*l.* was paid to the said T. Abernethie.

When the said sum of 500*l.* was paid, in the year 1832, into the banking-house of Messrs. Whitmore & Co., the bankers of the defendants, an entry was made by the defendant Clipperton in the books of the defendants, giving credit to the said T. Abernethie for the said sum of 500*l.* so received as aforesaid. When the said sum of 500*l.* was lent to the said J. H. Lane as aforesaid, an entry was in like manner made by the defendant Clipperton in the said books of the defendants, debiting the said T. Abernethie with the said sum of 500*l.* so lent; and similar entries were made at the time of the payment of the 500*l.* and the return of the 300*l.*; so that the books of the defendants shewed 200*l.* remaining to the credit of the said T. Abernethie. Interest at first on the 500*l.* mortgage, and then upon the 300*l.*, was regularly paid into the hands of the defendant Clipperton by the said H. Handford; and until the dissolution of the partnership of the defendants hereinafter mentioned, entries were made by the defendant Clipperton in the books of the defendants, giving

credit to the said T. Abernethie for the interest on the 500*l.*, and debiting him in like manner with the interest thereon paid to Charles Cox, as hereinafter mentioned.

The partnership between the defendants was dissolved on the 30th of July, 1838, and such dissolution was advertised in the London Gazette of the 31st of July, 1838; the fact of such dissolution was also known at the time it took place to John Brutton, one of the plaintiffs in this action, but was unknown to the said C. Cox, who was the agent to the said T. Abernethie, who was a colonel in the Royal Marines. The interest on the full sum of 500*l.* was regularly paid to the said C. Cox by the defendant Clipperton, and, up to the dissolution of partnership, by cheques drawn by the defendants on their bankers; and after the dissolution, it was paid by the defendant Clipperton, sometimes in cash, and sometimes by cheques on his own banker; but the said C. Cox was not aware of the dissolution of the partnership, or under what circumstances the money was paid, except that he knew it was interest on mortgage, but who was responsible for such payment he was wholly ignorant. In some of the receipts, after the death of T. Abernethie, the money was described as interest on mortgage.

The said T. Abernethie died on the 18th of May, 1840.

On the 19th of December, 1846, the said H. Handford paid into the hands of the defendant Clipperton the said sum of 300*l.*, with interest due thereon up to that day. The deed of mortgage was given up by the defendant Clipperton to the said H. Handford, but no receipt was indorsed thereon, nor was any reconveyance or deed or receipt signed or executed by the plaintiffs or any of them. The plaintiffs were not informed that the said sum had been so paid. The defendant Brutton was altogether ignorant of the said receipts and payments subsequent to the investment of the 500*l.* until 1849, except so far as the entries aforesaid in the said partnership books

1850.
SIMS
v.
BRUTTON.

1850.
 SIMS
 v.
 BRUTTON.

may be construed as notice of such receipts and payments. It was not until the year 1848 that the plaintiffs discovered that the mortgage money had been repaid.

The Court are to draw any inferences which a jury ought to draw from the above facts.

The question for the opinion of the Court is, whether the defendants are liable to the payment of the said sums of 500*l.* or 300*l.* or 200*l.*, or any or what part thereof. If the Court should be of opinion that the plaintiffs are entitled to recover either of those sums, or any part thereof, then a verdict to be entered accordingly; but if the Court should be of opinion that the plaintiffs are not entitled to recover, then a *nolle prosequi* to be entered.

Unthank, for the plaintiffs.—The action was commenced on the 3rd of February, 1849; and it is submitted that the defendants are liable for 500*l.*, or, at all events, for 200*l.* The money was originally remitted to the defendant Brutton, and he is answerable for the acts of his partner. [*Parke*, B.—The circumstance of the mortgage deed being in the possession of Brutton and Clipperton did not authorise them to receive the principal money: *Wilkinson v. Candlish* (a). Brutton performed his duty when he invested the money; then how do you create any liability with respect to the subsequent payment to Clipperton?] The money was paid to him as the agent of Colonel Abernethie, and he received it as such. Where money is paid into a bank for the use of one of its customers, all the partners are responsible. So here, the money was received by Clipperton, not for himself, but as a partner in the firm; and an entry of its receipt was made in the partnership books, which is sufficient notice to Brutton. [*Parke*, B.—Clipperton had no authority from Colonel Abernethie to receive the money, and the entry of its receipt in the

(a) *Ante*, p. 91.

partnership book is a mere matter of fact from which a jury would have to say whether Brutton knew of it. Suppose a person without any order, either express or implied, pays money into a bank for the use of another, could the latter maintain an action against the bankers for it? If they consented to receive it upon those terms; since they would then, for the purpose of payment, become the agent of the person for whose use it was paid in. No doubt the mere fact of money having been sent to a third person by a debtor, with directions to pay it to his creditor, does not of itself entitle the latter to maintain an action against such third person: *Williams v. Everett* (a); but where the person receiving the money acknowledges that he has received it for the purpose of paying it over to the creditor, the latter may sue him for it: *Lilly v. Hays* (b). [*Alderson*, B.—If there had been an arrangement with Colonel Abernethie that Brutton and Clipperton should receive the mortgage money, perhaps the receipt of Clipperton would have been the receipt of the firm; but it is not shewn that the firm had any authority to receive it. *Parke*, B.—Assuming that the money was paid to the firm, can the plaintiff maintain any action unless they engaged to pay it over to him? *Scott v. Porcher* (c).] The payment of interest was an admission by the firm that they held the money for the use of Colonel Abernethie. [*Parke*, B.—They did not pay it as interest on money of his in their hands, but as interest received from the mortgagor. Besides, there can be no liability until their act has been ratified.] The bringing this action amounts to a ratification, and a previous request is unnecessary: 1 Wms. Saund. 33. The case of *Blair v. Bromley* (d) shews, that a solicitor is liable for the misappropriation by his partner of money intrusted to him by a client for the purpose of investment.

1850.
 SIMS
 v.
 BRUTTON.

(a) 14 East, 582.

(b) 5 A. & E. 548.

(c) 3 Mer. 652.

(d) 5 Hare, 542.

1850.
Sims
v.
Brutton.

Then, with respect to the Statute of Limitations, the payment of interest is sufficient to prevent its operation.

Hugh Hill, for the defendant.—Upon these pleadings, independently of the Statute of Limitations, the defendants are entitled to have a *nolle prosequi* entered. The first count alleges a receipt of the money for the use of the testator, and a promise to pay him. It is clear that no such promise can be implied, for the testator neither authorised the receipt of the money by Clipperton, nor ratified his act. It is equally clear, that the money was never received for the use of the plaintiffs as executors, and that the facts do not raise any implied promise to pay them. Then, the Statute of Limitations is a complete bar; for the interest was not paid as interest on a debt due from the defendants, but as interest on the mortgage; and, as regards Brutton, none was paid after the year 1838. The statute began to run from the time the cause of action accrued, not from the time of the discovery of the fraud: *Blair v. Bromley*. [He was stopped by the Court.]

Unthank replied.

POLLOCK, C. B.—I am of opinion that a *nolle prosequi* ought to be entered. The action is against two defendants, and, being founded on contract, if it fails as to one, it fails altogether. Now, so far as regards Brutton, the Statute of Limitations is a complete answer. The partnership was dissolved in July, 1838, and since that time Brutton has had nothing to do with the transaction, nor is there any circumstance relating to him to take the case out of the statute. But on the broader ground, which was adverted to during the argument, I also think that the action is not maintainable. The defendants, who acted as the solicitors of Colonel Abernethie, discharged their duty by laying out the money on mortgage, and they had no authority to re-

ceive it back. Therefore the repayment to Clipperton, although treated by him as a partnership transaction, was not so in point of law, and did not create any partnership responsibility.

1850.
 SIMS
 v.
 BRUTTON.

PARKE, B.—I am of the same opinion. It is enough to dispose of this case, that one point is perfectly clear, viz. that there has been no promise in writing, or part payment of principal or interest, to prevent the operation of the Statute of Limitations. It is now well established, that, to take a case out of the statute, there must be a payment of interest *qua* interest, or a part payment of principal, thereby acknowledging more to be due. Here it is true that interest was paid, but it was not paid as interest on money due from the defendants to the plaintiffs' testator, but as interest represented to have been received by them from Handford, as the principal debtor. That will not take the case out of the Statute of Limitations. I must not, however, be understood as intimating any disagreement with the Lord Chief Baron as to the other point. Upon the facts found in this case it cannot be taken that it was any part of the business of the defendants, as solicitors, to receive repayment of the mortgage-money, and lay it out again at interest. For that purpose there must be some authority, either express or implied. *Wilkinson v. Candlish* decided, that a solicitor has no authority, from the mere possession of the mortgage-deed, to receive either principal or interest. So that, upon the finding in the case, this was not a transaction within the scope of the partnership business. Whether Clipperton alone might be responsible, or whether Brutton would be liable if Clipperton had been authorised to receive the money, we need not give an opinion—though I am by no means satisfied that, in such case, an action could be maintained against Brutton—but I have not the least doubt that, on the ground that there was no payment of principal or interest

1850.
 SIMS
 v.
 BRUTTON.

to take the case out of the Statute of Limitations, the defendants are entitled to judgment of nolle prosequi.

ALDERSON, B.—The partnership having been dissolved in 1838, and this action brought in 1849, it is clear that the Statute of Limitations must be a good defence, unless something has been done to prevent its operation. Now, Brutton and Clipperton dissolved partnership in the year 1838; and since that time there has been no payment by Brutton. But suppose that the money was properly received by Clipperton, there has been no payment of interest on a debt due from Brutton, but simply a payment of interest on money which Clipperton alone received as the agent of Colonel Abernethie. I also agree that there is no reason to doubt that the Lord Chief Baron is quite correct upon the other ground. Brutton is responsible only for those acts which were done by his partner in his character of solicitor. This was wholly beyond his authority and duty. If Clipperton had been authorised to receive the mortgage money, and had prepared a reconveyance, it would have been his duty as solicitor to see that the deed was properly executed, and that a receipt for the money was indorsed on the back; and it must then have been assumed that Brutton knew of the reconveyance. Here, Clipperton does an act which he had no right to do; and it would be strange if Brutton were responsible for an act done by his partner wholly out of the scope of the partnership authority. It is different in the case of bankers, for one banker has authority to receive money for the partnership. Nor is there here even knowledge; for the entries in the books are only admissible as evidence of knowledge, and the case expressly finds the contrary.

PLATT, B.—I am of the same opinion. No interest was ever paid on this particular debt, but the money was paid

as interest due to the mortgagee, and was so received by him. The other ground is equally clear. The case does not find that it was part of the business of the defendants, as solicitors, to receive the mortgage money, and the mere possession of the mortgage deed did not authorise them to do so. Therefore, Clipperton ought not to have received the money without the authority of his client, who would naturally suppose, that, before the money was paid off, he must execute a reconveyance. So that the receipt of the money by Clipperton was wholly beyond the partnership authority, and consequently Brutton is not responsible.

1870.
 SIMS
 v.
 BRUTTON.

Judgment of nolle prosequi.

CUBITT and Another v. THOMPSON and Others.

Nov. 19.

COVENANT.—The declaration stated, that, by an indenture, made between the plaintiffs, sheriff of Middlesex, of the one part, and the defendants of the other part, (profer), after reciting, that the plaintiffs, at the request of the defendant W. Thompson, had nominated and appointed him bailiff of the plaintiffs, the defendants covenanted with the plaintiffs, "that the said W. Thompson should not suffer any escape, nor permit any prisoner in his cus-

A declaration stated, that, by indenture made between the plaintiffs, a sheriff, and the defendants, after reciting that the plaintiffs had appointed the defendant T., their bailiff, the defendants covenanted

that T. "should not suffer any escape, nor permit any prisoner in his custody as bailiff to go at large," without the consent of the sheriff; and that, if any action was commenced against the plaintiffs "touching or concerning any matters wherein T. should act, or assume to act, as bailiff," T. would pay the sheriff his damages thereby incurred, and the defendants would save harmless the plaintiffs against all actions &c., "for or by reason of any extortion or escape happening by the act or default of T." The declaration then alleged, that the plaintiffs as sheriff took one H. on a ca. sa.; and that H. escaped out of custody "by the default of the defendant T., and not otherwise, the defendant T. then being bailiff of the plaintiffs as such sheriff. The defendants, after setting out the deed on oyer, pleaded, "that the default by which H. escaped was not a default of T. as such bailiff of the plaintiffs:"—*Held*, on special demurrer, that the plea was bad for ambiguity, as it might mean either that the default was not the act of T. as bailiff, or whilst assuming to act as bailiff, or in relation to his character of bailiff.

Semble, that the declaration would have been bad on special demurrer, for not stating in what way the default occurred.

1850.
CUBITT
v.
THOMPSON.

tody as bailiff aforesaid to go at large, without the consent or order in writing of the said sheriff, or other lawful authority; and that, if any action or suit was commenced or prosecuted against the plaintiffs, their under-sheriff or deputies, or any of them, touching or concerning any matters wherein the said W. Thompson should act or assume to act as bailiff aforesaid, the said W. Thompson should well and truly pay to the plaintiffs, their under-sheriff or deputies, or one of them, all costs, charges, damages, and losses by them or any of them incurred, paid, or sustained in or about the defence, or in consequence of any such action or suit; and that the defendants would save harmless and indemnify the plaintiffs, their under-sheriff and deputies, from and against all actions, suits, fines, amerciaments, penalties, contempts, forfeitures, loss, costs, damages, and expenses, which might be commenced, prosecuted, imposed, and set upon them or either of them, or which they or either of them might suffer, pay, or be liable unto, for or by reason of any extortion or escape happening by the act or default of the said W. Thompson, or for or by reason of the executing, not executing, returning, not returning, or misreturn of any writ, process, mandate, precept, or warrant, and not taking bail, or taking insufficient bail, and not bringing into Court the body of any defendant, or any other cause whatsoever happening by or arising from the act or omission, or instance, or request of the said W. Thompson." The declaration then stated, that whilst the defendant W. Thompson was their bailiff, one M. Morgan sued out a writ of ca. sa. directed to the sheriff of Middlesex, to take the body of one W. Hanson, and that the plaintiffs as sheriff took the said W. Hanson. The declaration then alleged several breaches, the last of which was as follows:—"That, after the said W. Hanson had been so arrested as aforesaid, and whilst he was in the custody of the plaintiffs as such sheriff as aforesaid, under and by virtue of the said writ and indorsement thereon as aforesaid, and

1850.
 CUBITT
 v.
 THOMPSON.

in pursuance of the said arrest, and whilst the defendant W. Thompson was such bailiff of the plaintiffs as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid, to wit &c., the said W. Hanson, without the permission, and against the will of the plaintiffs as such sheriff as aforesaid, and of the said M. Morgan, escaped out of the said custody of the plaintiffs as such sheriff, and that such escape then happened by the default of the defendant W. Thompson, and not otherwise, he, the defendant W. Thompson, then being bailiff of the said plaintiffs as such sheriff as aforesaid, under and in pursuance of the nomination aforesaid." Averment, that, in consequence of the said escape, M. Morgan commenced an action against the plaintiffs, and recovered judgment for 66*l.* 12*s.* 8*d.*, together with costs. The defendants cravedoyer of the indenture, and set it out. Among other covenants, it contained the following:—"That, if any action or suit be commenced or prosecuted against the said sheriff, or under-sheriff, or deputies, or any of them, touching or concerning any matter wherein the said bailiff shall act or assume to act as bailiff aforesaid, the said bailiff shall well and truly pay to the said sheriff, under-sheriff, or deputies, or one of them, all costs, charges, damages, and losses by them or any of them incurred, paid, or sustained in or about the defence or in consequence of such action or suit." Also, "that the said bailiff and his sureties shall and will save harmless, and indemnify, the said sheriff, under-sheriff, and deputies, from and against all actions, suits, fines, and amerciaments, penalties, contempts, forfeitures, loss, costs, damages, and expenses which may be commenced, prosecuted, imposed, or set upon them or either of them, or which they or any or either of them may suffer, pay, or be liable unto, for or by reason of any extortion or escape happening by the act or default of the said bailiff, or for or by reason of the executing, not executing, returning, not returning, or misreturning of any writ, process, mandate, precept, or warrant, the not

1850.
 CUBITT
 v.
 THOMPSON.

taking bail, taking insufficient bail, and not bringing into Court the body of any defendant, or any other cause whatsoever, happening by or arising from the act or omission, or instance, or request of the said bailiff." The defendants pleaded (*inter alia*) to the last breach, that the said default of the said W. Thompson in that breach mentioned, by which the said W. Hanson so escaped, as in that breach mentioned, was not a default of him the said W. Thompson as such bailiff of the plaintiffs, as in the declaration mentioned, *modo et formâ*, concluding to the country.

Special demurrer, assigning for causes, (amongst others) that the plea was ambiguous and uncertain, and confessed, but did not avoid, the breach of covenant. Joinder in demurrer.

Bramwell, in support of the demurrer.—The plea is bad in form and substance. It admits the escape, and that Thompson was the plaintiffs' bailiff, and that the escape happened by his default. The allegation, that the escape was not by the default of Thompson *as bailiff*, is ambiguous; it may mean either while acting as bailiff, or in relation to his character as bailiff. Suppose, for instance, Thompson had taken the execution debtor to a lock-up house, the keeper of which suffered him to escape, the defendants would nevertheless be liable. The covenant provides for the consequences of three classes of acts, viz the acts of the bailiff as bailiff, acts done by him while assuming to act as bailiff, and all acts whereby the sheriff is damnified, without reference to the character in which such acts were done. If the bailiff, having in his custody a debtor, against whom detainers were lodged, suffered him to be at large without first searching the detainer-book, that would be a breach of this covenant, although not a default in his character of bailiff; for his duty as bailiff is confined to the execution of the particular writ entrusted to him. [*Parke, B.*—The declaration

does not explain what the default was, or how the escape occurred; and on that ground would be bad on special demurrer.] That defect is cured by pleading over.

1850.
CUBITT
v.
THOMPSON.

Crompton, contra.—Either the declaration is bad, or the plea is good. The declaration does not in terms allege a breach of duty *as bailiff*, but if that is implied, the defendant has a right to traverse it. Now the meaning of the covenant is not that the defendants will indemnify against the acts of W. Thompson, but against the acts of the “said bailiff.” The sureties are only bound with reference to acts connected with his duty as bailiff. If the default complained of was not a default *quâ* bailiff, then the declaration is bad.

Bramwell was not called upon to reply.

PARKE, B.—The traverse taken by the plea is bad, since it may mean several things. If another bailiff had delivered a debtor into the custody of Thompson, having no warrant, and he had suffered the debtor to escape, though the custody might be unlawful, the defendants would be liable to the sheriff; for under this covenant they are responsible for every escape occasioned by the default of Thompson. The declaration, indeed, would have been bad on special demurrer, since it does not point out how the default occurred; but that defect is cured by pleading over. Under the traverse taken by the plea, the plaintiff would be bound to prove a default by Thompson *in some way*, either with reference to his character as bailiff or as assumed bailiff, or in relation to his duty as bailiff. As the Court cannot say what the plea means, the traverse taken by it is clearly bad.

ALDERSON, B., and PLATT, B., concurred.

Judgment for the plaintiff.

1850.

Nov. 20.

BERTON *v.* WILLIAM LAWRENCE and DONALD NICOLL,
 Sheriff of Middlesex, and WILLIAM DANIELLS.

Semble, that in debt on the 29th Eliz. c. 4, against the sheriff for extortion, on executing several writs of *fi. fa.*, it is not sufficient to allege that the defendant took for the said executions a certain sum, being a larger recompense than is by the statute limited, that is to say £— more; but the declaration should state what he ought to have taken, and what was the excess on each writ.

DEBT for treble damages, under the 29 Eliz. c. 4, for extortion.—The declaration stated, that heretofore, to wit, on &c., a writ of *fieri facias* was issued out of the Court of Exchequer by and at the suit of H. Hering and H. Remington against the now plaintiff, directed to the sheriff of Middlesex, and commanding &c., (setting out the mandatory part of the writ); which said writ was indorsed to levy 66*l.* 13*s.*, and interest on the same, and 1*l.* for the said writ, besides sheriff's poundage, &c. The declaration then stated in similar terms the issuing of four other writs of *fieri facias* against the now plaintiff by other persons, and proceeded thus:—"Which said several writs, so indorsed as aforesaid, were afterwards, to wit, on &c., delivered to the defendants William Lawrence and Donald Nicoll, who then and from thenceforth, until, and at, and after the time of committing the grievance, were sheriff of the county of Middlesex, to be executed in due form of law: And the defendants W. Lawrence and D. Nicoll, so being and as such sheriff, by the defendant William Daniells, then being their bailiff in that behalf, afterwards, to wit, on &c., seized and took in execution under the said several writs respectively, divers goods and chattels of the now plaintiff, of great value, to wit, of the value of the monies indorsed on the said several writs and thereby directed to be levied. Nevertheless, the defendants W. Lawrence and D. Nicoll, so being and as such sheriff, and the defendant W. Daniells, so being and as such bailiff, not regarding their duty in that behalf, nor the form of the statute in such case made and provided, but contriving &c., afterwards, to wit, on &c., by reason and colour of their several offices as such sheriff and as such bailiff as aforesaid, wrongfully, illegally, and oppressively took, had, and re-

ceived of the now plaintiff, for the serving and executing of the said several executions, a large sum of money, to wit, 52*l.* 12*s.* 3*d.*, the same sum being a larger, greater, more, and other consideration and recompense than by the statute in that behalf is limited and appointed, that is to say, 35*l.* 18*s.* 6*d.* more and other consideration and recompense than in and by the said Act is limited and appointed, contrary to the form of the statute &c. By means whereof the now plaintiff was and is damaged and aggrieved to the amount of the said sum of 35*l.* 18*s.* 6*d.*, contrary to the form of the statute &c.; and thereby and by force of the said statute an action hath accrued to the now plaintiff to demand and have of and from the defendants the sum of 107*l.* 15*s.* 6*d.*, being treble the amount of the said damages," &c.

Special demurrer, assigning for causes, that it is left uncertain what consideration and recompense ought to have been taken by the defendants; nor does it appear that they have taken more consideration and recompense than is allowed by law; that the defendants cannot take issue upon the statements in the count without referring to the jury the determination of the question of law, whether the defendants have taken more than is by law allowed; that it ought to have been shewn with particularity what the sums were which the defendants were entitled to take, and the excess, if any, on each sum, or from or in what manner or in respect of what charge or fee the excess complained of arose. Joinder in demurrer.

Bramwell (*Burchell* with him) in support of the demurrer.—The declaration does not state, with sufficient particularity and certainty, of what the extortion consists. Five writs of fieri facias are set out; and if the plaintiff should prove a seizure of any goods under those writs, the matter would still be open, whether the defendants had taken more than was allowed by law. It might be, that the goods were

1860.
BERTON
v.
LAWRENCE.

1850.
 BERTON
 v.
 LAWRENCE.

not sufficient to satisfy all the executions, but such a plea would be bad. The declaration should have stated how much the sheriff received on each execution, and what was the excess taken on each. Under the plea of not guilty, the jury would have to determine the questions both of fact and law, viz. whether the defendants took the amount alleged, and whether the same was a greater recompense than allowed by law. Only one sum being stated as the excess on several writs, the defendants cannot tell whether they are charged with extortion upon the whole amount realised, or under any particular writ. [*Platt*, B., referred to *Woodgate v. Knatchbull* (a).] Besides, how is the sheriff to plead? is he to say as to one writ, "I took so much, and as to another so much?" This declaration is in the nature of five different actions, and the defendants must be prepared at the trial to meet a charge of extortion upon each of these writs, when perhaps the only question in dispute might be as to one of them. [*Parke*, B.—Would this declaration be supported if the plaintiff proved five separate seizures under five different writs?] The plaintiff might prove either a gross levy and a gross charge, or five separate levies and five charges, or a levy and a charge under one or more of the writs. It might be, that some of the charges are perfectly justifiable, and upon those the plaintiff would join issue; as to others, which could not be defended, he would pay money into Court. In *Pilkington v. Cook* (b), this point was raised but not decided. [*Parke*, B.—A similar objection was taken in *Ashby v. Harris* (c), and the Court said there was great weight in it.] In *Usher v. Walters* (d), the declaration was held bad on special demurrer, for not shewing what excess was taken on each fee. This declaration should follow the form of that in *Wrightup v. Greenacre* (e), which contained an averment of how much

(a) 2 T. R. 148.

(b) 16 M. & W. 615.

(c) 2 M. & W. 673.

(d) 4 Q. B. 553.

(e) 10 Q. B. 1.

the sheriff was entitled to take, and how much he actually took.

1850.
BERTON
v.
LAWRENCE.

Piggott, contra.—The declaration is in accordance with the usual precedents. In *Usher v. Walters*, the declaration was framed on the joint effect of the 29 Eliz. c. 4, and 1 Vict. c. 55, so that the Court could not tell under which statute the fees were taken, and on that ground the action failed. In *Ashby v. Harris* there was no averment of how much the sheriff took, but only that he took more than was allowed by law. Here it is stated, that the defendant took 52*l.* 12*s.* 3*d.*, and that he took 35*l.* 18*s.* 6*d.* too much, so that the excess is easily ascertained by subtraction. Mixed questions of law and fact are frequently submitted to the jury; for instance, the question of reasonable and probable cause, in an action for a malicious prosecution; or whether the defendant is guilty of a conversion in an action of trover. [*Parke, B.*—Is the plaintiff bound to prove that the whole was levied under all the writs at the same time?]. The extortion is charged on the whole gross sum. Where several writs are delivered to the sheriff, a levy under one is a levy under all; and it is impossible for the debtor to know under which the extortion is made. The declaration is sufficiently certain for every purpose.

Bramwell replied.

PARKE, B.—The objection, that it does not appear with sufficient certainty, whether the levy was under all the writs at the same time, or how otherwise, is not raised by the special demurrer. The defendants may have liberty to amend by withdrawing the demurrer, if so advised.

Bramwell subsequently elected to amend.

Amendment accordingly.

1850.

Nov. 22.

ROOM v. COTTAM.

On motion for a suggestion to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, an affidavit, which stated that the plaintiff did not dwell more than twenty miles from the defendant, was held bad, for not shewing the distance from the defendant's residence.

THIS was a rule nisi to enter a suggestion to deprive the plaintiff of costs, under the County Courts Act, 9 & 10 Vict. c. 95.

The rule was obtained on the affidavit of the defendant, which stated, that the plaintiff resided at Birmingham, in the county of Warwick; that the action was brought for goods sold and delivered to this deponent at his present place of residence and place of business at West Bromwich, in the county of Stafford, and that the goods were delivered to this deponent at his said residence and place of business at West Bromwich, and within the jurisdiction of the County Court of Staffordshire, at Oldbury; that, at the time of the commencement of this action, the plaintiff did not dwell more than twenty miles from this deponent, but within twenty miles from this deponent, that is to say, within seven miles.

Joyce shewed cause.—The affidavit is insufficient. In order to take the case out of the exception contained in the 128th section of the 9 & 10 Vict. c. 95, it must appear that the plaintiff dwelt within twenty miles of the defendant's residence. Here it is only stated, that the plaintiff dwelt within twenty miles "from the defendant," and the distance between Birmingham and West Bromwich is not shewn. A similar objection was held fatal by the Court of Common Pleas, in *Johnson v. Ward* (a), and *Kirby v. Hickson* (b); and the same rule was adopted by this Court in *Duck v. Barton* (c).

The Court called on

Lush to support the rule.—It is enough for the defend-

(a) 7 C. B. 868. (b) 1 L. M. & P. 364. (c) 4 Exch. 873.

1850.
 ROOM
 v.
 COTTAM.

ant to make out a *prima facie* case within the words of the Act; and if the parties did not in fact reside within the prescribed distance, that should come from the plaintiff by answer: *Butler v. Corney* (a). In *Peterson v. Davis* (b), where a similar objection was taken, the Court of Common Pleas allowed a suggestion to be entered. [*Alderson, B.*—There the suggestion, being in the form of the affidavit, was held bad.] In *Johnson v. Ward*, the affidavit did not state where the defendant resided. In *Hayter v. Fish* (c), the affidavit was held sufficient, though in precisely the same terms as the present.

PARKE, B.—I much doubt the propriety of the decision in *Hayter v. Fish*. It has, however, since been considered by the Court of Common Pleas in the case of *Kirby v. Hickson*, and expressly overruled. There being, therefore, two cases opposed to each other, we ought to decide according to the latter. It is not enough for the party, in the first instance, to bring himself within the words of the statute, but he must shew, that his case is within the true meaning of the Act. This affidavit is insufficient, as it does not state what was the distance between the places of residence of the plaintiff and defendant. If we once depart from the strict rule, and admit of equivalents, we shall be called upon to go further in each case, until at length it will be impossible to assign perjury on these affidavits.

ALDERSON, B.—I am of the same opinion. *Kirby v. Hickson* is supported by *Peterson v. Davis* and *Duck v. Barton*. We ought never to be called upon to decide as to the sufficiency of equivalents, when there is no difficulty in following the proper form.

PLATT, B., concurred.

Rule discharged with costs.

(a) 2 Exch. 474.

(b) 6 C. B. 235.

(c) 6 C. B. 568.

1850.

Nov. 22.

WILSON v. THE CALEDONIAN RAILWAY COMPANY.

By the 8 & 9 Vict. c. clxii. incorporating the Caledonian Railway Company, six miles of which are in England and the rest in Scotland, the Companies Clauses Act, 8 & 9 Vict. c. 16, is incorporated with the Company's Act, so far as is necessary for carrying into effect the English portion of the line. The principal office of the Company was in Scotland, and they had no office out of Scotland, except a station at Carlisle, used only for receiving passengers and goods. The plaintiff having a claim in debt against the Company, in respect of their amalgamation with another Scotch Railway:—*Held*, that service of the writ of summons on the secretary of the Company while attending a meeting in London, was good service.

THIS was a rule calling on the plaintiff to shew cause why the service of a writ of summons should not be set aside for irregularity.

The rule was obtained on the affidavit of W. Coddington, of Glasgow, the secretary of the Company, which stated, that the action was in debt, and that the service of the writ in question was made by delivering the same to him whilst he was attending a meeting of shareholders in London. That the principal office of the Company had always been in Scotland, and there was no more than one principal office, and no other office out of Scotland, except a railway station at Carlisle, occupied jointly by the said Company and the Lancaster and Carlisle Railway Company, for passengers and goods, but not for transacting any general business of the Company. That the Caledonian Railway Company was incorporated by the 8 & 9 Vict. c. clxii. for the purpose of making a railway from Carlisle to Edinburgh and Glasgow; that the line is wholly in Scotland, except a small portion thereof for the space of six miles, or thereabouts, which lies in Cumberland. That the plaintiff's claim arose out of the amalgamation of a Scottish railway, called the Polloc and Govan and Clydesdale Junction Railway, with the Caledonian Railway Company. That the secretary had no authority from the Company to accept service of process for them out of Scotland.

Willes, shewed cause.—The claim in the present action is transitory, for debts and contracts are nullius loci. The Court then, having jurisdiction over the Company, the only question is, whether they have been properly served. At common law, proceedings against corporations were by distringas on their lands and goods. If they had no property, the only remedy was in Parliament: 1 Tidd, Prac.

p. 121, 9th edit. Now, however, by the Uniformity of Process Act, (2 Will. 4, c. 39, s. 13) writs of summons may be served on the secretary of a corporation. So that if it had rested there, this service would have been regular. But, in addition, the 1st section of the 8 & 9 Vict. c. clxii enacts, that the Scotch Companies Clauses, Lands Clauses, and Railway Clauses Consolidation Acts, 1845, (8 & 9 Vict. cc. 17, 19, and 33) "shall, so far as not otherwise provided by this Act, be incorporated with and form part of this Act." And by section 2, after reciting 'that a portion of the railway and works thereafter authorised to be made and maintained, will be situate in that part of the United Kingdom called England,' it is enacted, "That so far as may be necessary for carrying into effect the object and purposes of this Act, in relation to such portion of the said railway and works," the Companies Clauses, the Lands Clauses, and the Railway Clauses Consolidation Acts, 1845, (8 & 9 Vict. cc. 16, 18, 20) "shall apply to and form part of this Act." Then, by the 135th section of the Companies Clauses Act, "any writ or other proceeding at law or in equity" may be served on the Company by being given personally to the secretary. And the 137th section of the Scotch Act contains a similar provision. If, therefore, those Acts apply, there has been good service under them; if not, the writ has been well served under the 2 Will. 4, c. 39. The decision in *Evans v. The Dublin and Drogheda Railway Company* (a), turned on the particular language of the Company's Act, 6 & 7 Will. 4, c. cxxxii. s. 184. Besides, there the Company was altogether out of the jurisdiction, here the defendants are clearly within the jurisdiction, with respect to that portion of their line which is in England. All causes of action of a transitory nature which accrue abroad, may be sued on in this country: *Mostyn v. Fabrigas* (b). If the Court hold this service altogether bad, they

1850.
WILSON
v.
CALLEDONIAN
RAILWAY CO.

(a) 14 M. & W. 142.

(b) Cowp. 161.

1850.
 WILSON
 v.
 CALEDONIAN
 RAILWAY Co.

will in effect declare that they have no jurisdiction, even as to that portion of the line which is in England. If they decide that the service is good for some purposes and not for others, they will, on every question as to the sufficiency of service, be called upon to try the cause itself on affidavits.

Rew in support of the rule.—The question depends upon whether this is a Scotch Company or not; if it be a Scotch Company, the Court has no jurisdiction, and the service is bad. The mere fact of the Company possessing property in this country will not give the Court jurisdiction. Though their property may be liable to seizure, that is only a mode of enforcing jurisdiction, which the argument on the other side confounds with the question of jurisdiction. The same principle will apply to the construction of this Act as of that in *Evans v. The Dublin and Drogheda Railway Company*. The action is brought for a claim arising out of the amalgamation of a Scotch Company. [*Parke, B.*—This corporation has a double character, it is partly Scotch and partly English, and, as such, is amenable to the Courts of this country.] The Scotch Companies Clauses Act, 8 & 9 Vict. c. 17, does not contemplate that a Scotch Company could be sued in England. In *Pilbrow v. Pilbrow's Atmospheric Railway Company (a)*, it was held, that service on a director at Barnet was not good service on a Company carrying on business in London. [*Platt, B.*—The Company make a contract in England to carry a passenger safely along the entire line. If an injury is done to him in Scotland through the negligence of the Company, is he not entitled to sue them in this country? *Alderson, B.*—Might not the Company sue and be sued in either country upon contracts made with them?] Possibly they might in the case of a bill of exchange.

(a) 3 C. B. 730.

PARKE, B.—The rule must be discharged. I do not see how it is possible to say that this is not an English corporation for some purposes; and, if so, the writ has been properly served. The action arises out of an obligation imposed by statute upon the Company in its two fold character. They are authorised to construct a railway from Carlisle to the Scottish border; and all contracts made by them are binding, both in their character of a Scotch and an English corporation. Besides, the Lands Clauses Acts, Scotch and English, are incorporated with the Company's Act.

1850.
WILSON
v.
CALEDONIAN
RAILWAY Co.

ALDERSON, B.—I am of the same opinion. The last circumstance mentioned by my brother *Parke*, shews that this Company is both Scotch and English, and may be sued in either character; and that, to my mind, gets rid of all difficulty.

PLATT, B., concurred.

Rule discharged with costs.

VON DADELSZEN v. SWANN.

Nov. 11.

ASSUMPSIT for the breach of an agreement to procure and hand over to the plaintiff a certain dishonoured bill of exchange for 391*l.* 10*s.* 3*d.*—Plea: non assumpsit.

At the trial, before *Pollock*, C. B., at the last Kent Summer Assizes, the plaintiff tendered in evidence the following letter, addressed to him by the defendant:—

"Dear Sir,—I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of the Derby and Derbyshire Bank; and I hereby undertake to procure and hand the said bill over to you; and I have now given you Messrs Dixon's order for 500 tons of iron.

Yours, &c.

J. SWANN."

The following document, stamped as an agreement, was held admissible in evidence, without a receipt stamp:—"I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of D.; and I hereby undertake to procure and hand the said bill over to you."

1850.
 VON
 DADKLSZEN
 v.
 SWANN.

This letter was stamped with a 2s. 6d. agreement stamp. On the part of the defendant it was objected, that it was inadmissible without a receipt stamp. The learned Judge overruled the objection, and a verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

Lush now moved accordingly.—The document is an agreement, and also a receipt for 391*l.* 10*s.* 3*d.*, and should therefore have been stamped with a 5*s.* receipt stamp. [*Pollock*, C. B.—It is a mere undertaking to deliver up the bill. Suppose the words had been “You having paid me, I undertake to procure and hand over the bill to you when I get it.”] The language of the Stamp Act, 55 Geo. 3, c. 184, Sched. Part. 1, tit. “Receipt,” is very large. It enacts, that “all receipts, discharges, and acknowledgments, which shall be given for or upon payments made by or with any bills of exchange, drafts, promissory notes, or other securities for money, shall be deemed and taken to be receipts given upon the payment of money, within the intent and meaning of the schedule.” [*Parke*, B.—The case falls within the 11th exception. The consideration for the promise contained in the agreement is the payment of the amount of the bill by the cheque. Therefore, this is “a receipt written in an instrument acknowledging the receipt of the consideration money therein expressed,” and the instrument is “duly stamped according to the laws in force at the date thereof,” as an agreement.]

PER CURIAM (a).—There will be no rule.

Rule refused.

(a) *Pollock*, C. B., *Parke*, B., *Alderson*, B., and *Platt*, B.

1850.

JOB v. BUTTERFIELD and Another.

Nov. 22.

IN this case, the plaintiff had obtained a rule calling on the defendant Butterfield to shew cause why a rule, obtained by him on the common affidavit, to change the venue from Middlesex to York, should not be set aside. The present application was supported by the affidavit of the other defendant, which stated, that the rule for changing the venue had been obtained without his assent, which was never asked, and that, if it had been asked, he would have refused to give it.

One of several defendants may, in general, change the venue on the common affidavit, without the consent of the others; and if the latter are prejudiced by that step, they should apply, on special grounds, to bring it back.

Milward shewed cause.—As a general rule, one of several defendants is entitled to change the venue on the common affidavit: *Box v. Read* (a). The only exceptions are where some manifest injustice would arise, unless the other defendant joined in the application. Thus, in *Eccles v. Holland* (b), where the proceedings were commenced by original in London, the Court refused to change the venue to a county palatine, on the application of three of the defendants, unless the fourth joined them in an undertaking not to assign the want of an original for error. Also, in *Braddeley v. Rippon* (c), the Court would not permit one of several defendants to change the venue to a county palatine, assigning as a reason, that they had no authority to bind the other defendants to the terms of not assigning error on the want of an original. A similar application was refused in *Groves v. Thackery* (d), where one of several defendants had suffered judgment by default in Middlesex. But those exceptions prove the rule. There is an anonymous case in *Chitty's Reports* (e), which seems at variance with these authorities, but no reasons are there given.

(a) Barnes, 482; Prac. Reg. C
P. 430.

(b) 4 M. & Selw. 233.

(c) 5 Taunt. 87.

(d) Id. 631.

(e) 2 Chit. Rep. 417.

1850.

JOB

v.

BUTTERFIELD.

R. B. Miller in support of the rule.—The practice is thus stated in Chitty's Archbold (a): "It may be made by one of several defendants. One of several defendants, however, cannot change the venue without the consent of the others; but if there be reason to infer their consent, it may be changed upon the application of one of them, though the others have by pleading, obtaining time on terms, or even suffering judgment by default, lost their privilege." The reason is, that one defendant shall not be prejudiced by the act of his co-defendant. Here the other defendant states, that his assent was not asked; and that, if it had been, he would not have given it.

PARKE, B.—The rule must be discharged. *Box v. Read* is an express authority, that in ordinary cases one of several defendants may change the venue. The cases referred to, in which the Court of Common Pleas refused to allow that to be done, proceeded on the ground that the plaintiff would be prejudiced by that step. The very distinction taken in those cases shews that, in general, the venue may be so changed: if, in this case, the other defendant is prejudiced by the change of venue, he should have applied to the Court on special grounds.

ALDERSON, B., and PLATT, B., concurred.

Rule discharged with costs.

(a) Vol. 2, p. 1165, 8th edit.

1850.

MILNER v. FIELD.

Nov. 25.

ASSUMPSIT for goods sold and delivered, work and labour, and materials, &c. Pleas: non-assumpsit, payment, and set-off. Issues thereon.

At the trial, before *Pollock*, C. B., at the last Surrey Assizes, it appeared that the plaintiff sought to recover for work done under a written agreement, whereby the plaintiff agreed to build for the defendant thirty houses, for the sum of 3130*l.*, to be paid by instalments as the works progressed. There were penalties for the non-performance of the works at certain stipulated periods; and also a proviso, that none of the instalments should be payable, unless the plaintiff should deliver to the defendant a certificate, signed by the surveyor for the time being of the defendant, that the works had been in all respects well and substantially performed, according to the specifications and plans. Some of the instalments had been paid, and the action was brought to recover the balance. No certificate was obtained, but the plaintiff's counsel tendered evidence to shew that the defendant had appointed his own father as his surveyor, and that although the works were in all respects properly done, the certificate was withheld fraudulently and by collusion with the defendant. It was objected, on the part of the defendant, that this evidence was inadmissible; and the learned Judge, being of that opinion, nonsuited the plaintiff, reserving leave for the plaintiff to take the opinion of the Court upon the point; and if they should think the evidence admissible, the cause was to be referred.

Where a building agreement between the plaintiff and defendant contained a proviso, that no instalment should be paid unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to the specifications:—*Held*, that the want of a certificate was a good defence under the general issue to an action for the instalments; and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant.

Lush in the present Term (November 11) moved accordingly, and submitted, that the want of a certificate could not be taken advantage of under the general issue;

1850.

MILNER
v.
FIELD.

but that the proviso should have been pleaded specially; or, at all events, the plaintiff ought to have been allowed to give evidence of fraud.

Cur. adv. vult.

POLLOCK, C. B., now said—In this case there will be no rule. Where, by the contract itself, the certificate of a surveyor is made a condition precedent to the right to payment, even if it be withheld by fraud, that is only the subject of a cross action. The nonsuit, therefore, was right.

Rule refused.

Nov. 16.

TIELENS v. HOOPER.

By indenture, the plaintiff granted to the defendant, for a term of years, the exclusive licence to use a patent, upon payment of certain sums by way of royalty. The indenture contained a covenant for payment of the royalty, and also the following:—

“And it is hereby agreed,

that if it shall happen in any year during the continuance of the term that royalties or sums of money hereinbefore covenanted to be paid shall not amount to the sum of 2000*l.* sterling, then and in every such case, and as often as the same shall so happen, the defendant shall, within fourteen days after the expiration of any year in which it shall so happen, pay to the plaintiff such a sum of money as with the royalty hereby reserved will amount to 2000*l.* for that year; or if the defendant shall, at any time, make default in payment of such sum of money aforesaid, within the time appointed for payment, then it shall be lawful for the plaintiff, by writing signed by him, and indorsed on the said indenture or duplicate thereof, to declare that the said indenture, and the powers and licence thereby granted, shall cease and determine:—*Held*, that this was not an absolute covenant, on the part of the defendant, to pay 2000*l.* a-year during the term, but an alternative covenant, enabling the plaintiff to put an end to the licence on non-payment of that sum by the defendant.

COVENANT.—The declaration stated, that, by an indenture made between the plaintiff and defendant, the plaintiff granted to the defendant, for a term of years, the exclusive licence to use a patent for improvements in a machine, upon payment to the plaintiff of certain sums by way of royalty during the said term. It then set out the following clause: “And it is hereby agreed, that if it shall happen in any year during the continuance of the said term, that the royalty or royalties, or sum or sums of money hereinbefore covenanted to be paid as aforesaid, shall not amount to the sum of 2000*l.* sterling, then and in every such case, and as often as the same shall so happen, the

defendant shall, within fourteen days after the expiration of any year in which it shall so happen, pay to the plaintiff, or the person or persons entitled to the patent, such a sum of money as, with the royalty or royalties hereby reserved and covenanted and agreed to be paid as aforesaid, will amount to and make up the whole and clear sum of 2000*l.* for that year; or, if the defendant shall at any time make default in payment of such sum of money aforesaid within the time appointed for payment, then it shall be lawful to and for the plaintiff, or the person or persons for the time being entitled to the patent, by any writing signed by them or him, and indorsed on the said indenture or duplicate thereof, to declare that the said indenture, and the power and licence thereby granted, shall cease and determine."—Breach, that, although the sums by way of royalty amounted to less than 2000*l.* a-year, the defendant had not, within fourteen days after the expiration of the year, paid to the plaintiff such a sum as with the royalty made up the full sum of 2000*l.* a-year.

The defendant demurred generally, after setting out on oyer the indenture, which, in addition to the above covenant, contained a covenant on the part of the defendant to pay the royalty. Joinder in demurrer.

Hugh Hill argued in support of the demurrer (Nov. 15).—This is not an absolute covenant to pay 2000*l.* a-year during the continuance of the term, but it is an alternative covenant, by which the defendant has the option of paying the 2000*l.* a-year, or, if he do not, the plaintiff may determine the licence. The covenant must be construed according to the plain meaning of the words and the intention of the parties. "It is hereby agreed," may be words either of condition or of covenant. Some effect must be given to the word "or," and there is no reason why it should not be read in its ordinary grammatical sense.

1850.
TIMLENS
v.
HOOPER.

1850.
 TIBBENS
 v.
 HOOVER.

Montague Smith contra.—This is a grant of the exclusive licence to use the patent for the whole of the term, and it is reasonable that the licensor should have a rent certain in return for it. The stipulation cannot be construed as a condition, without rejecting the words “and it is hereby agreed,” which import a distinct and independent covenant. In Bacon’s Abr., Covenant (A), it is said, “The law does not seem to have appropriated any set form of words, which are absolutely necessary to be made use of in creating a covenant; and therefore it seems that any words will be effectual for that purpose, which shew the party’s concurrence to the performance of a future act: as, if lessee for years covenants to repair, &c., *provided always, and it is hereby agreed, that the lessor shall find great timber, &c.* this makes a covenant on the part of the lessor to find great timber by the word ‘agreed;’ and it shall not be a qualification of the covenant of the lessee.” This is not an alternative covenant, because no option is given to the covenantor. There is an absolute obligation to pay the annual sum, and the word “or” may well be read “and.” If an apprentice deed contained a stipulation, that the apprentice should well and faithfully serve, or the master might put an end to the apprenticeship, the latter might nevertheless sue for a breach of the covenant. The term “provided” may operate as a covenant: *Shep. Touch. ch. 7, p. 162.*

Hugh Hill, in reply, cited Co. Litt. 203. b., *Simpson v. Titterell* (a), *Hays v. Bickerstaffe* (b), *Warren v. Asters* (c).

Cur. adv. vult.

POLLOCK, C. B., now said—This was an action of covenant on an indenture, by which the plaintiff granted to

(a) Cro. Eliz. 242. (b) 2 Mod. 35. (c) T. Jones, 205.

the defendant a licence to work a patent for improvements in a certain machine. The plaintiff by his declaration claimed 2000*l.* per annum for a certain period, on the ground that the agreement between the parties was for a minimum rent. The indenture contained a stipulation, that the plaintiff should have a certain share of the benefit or royalty, as it was called; but it was contended, on the part of the plaintiff, that the meaning of the parties was, that there should be a minimum rent. The part of the indenture, upon which that question arises, is as follows:—[His Lordship read the passage above set out.] The question submitted for the opinion of the Court is substantially this, whether the word “or” should be read “and,” that is, whether there is a stipulation for a minimum rent, with an additional clause, that, if it be not paid, the licence may be put an end to, or whether this is to be read as an alternative covenant, viz. that if the party chooses to pay the licence will continue, or if he does not pay, that then the plaintiff shall have the power to put an end to it. We are of opinion, there being only these two alternatives, and the word “or” occurring in the way in which it does, that we are bound to give effect to the plain and grammatical meaning of these expressions. And for myself, I must say that I think that is by far the most reasonable conclusion to come to. In the case of a patent, the patentee may very well say, “If I grant you a licence, which in substance is an exclusive licence, reserving to myself a certain royalty or share, if I find that that does not amount to a certain sum, then you shall either make that sum up to me, or I shall have the power of putting an end to the licence.” It merely means this:—I think the invention is of great utility, it may be of great profit, and if it turns out that you, from a want either of spirit or industry in pressing it, or a want of attention to business, or for any other reason, do not make it available, so that my royalty is gone, then I claim to myself the power

1850.
 TIMMONS
 v.
 HOOPER.

1850.
 TIELKENS
 v.
 HOOPER.

of taking the invention from you, and carrying it to some other person who will probably make more use of it. For myself, I think it is far more reasonable to suppose that the parties came to that agreement, than that they came to a stipulation for a minimum rent of 2000*l.* per annum, without being at all confident that the invention would produce 500*l.* In construing agreements, as well as in construing Acts of Parliament, the Court is bound to put on them that meaning which is the plain, clear, and obvious result of the language used. In the present case it happens, so far as my judgment goes, that the meaning which we affix to the words used by the parties, is also by far the most natural and probable agreement the parties would have made under the circumstances. Our judgment, therefore, will be for the defendant.

Judgment for the defendant.

Nov. 23. **DEVEREUX v. THE KILKENNY AND GREAT SOUTHERN AND WESTERN RAILWAY COMPANY, *In re* EMERY.**

A scire facias may be obtained at the suit of a creditor against a shareholder in a Joint-stock Company, under the 36th section of the 8 Vict. c. 16,

PEACOCK moved for a rule, calling on George Emery to shew cause why a writ of scire facias should not issue against him, as a shareholder in the Kilkenny and Great Southern and Western Railway Company, under the provisions of the 36th section of the Companies Clauses Consolidation Act, 8 Vict. c. 16 (a).

(the Companies Clauses Consolidation Act):—*Quære*, whether that is the sole remedy.

Where a Company was established for the purpose of making a railway in Ireland, and the plaintiff had recovered judgment against the Company, and had issued a writ of *fi. fa.* into the county of Surrey, to which there was a return of *nulla bona*, and had issued a *testatum fi. fa.* into Middlesex, to which writ there was a like return, but he had not taken any means to levy execution in Ireland, the Court made the rule absolute to issue a scire facias against a shareholder of the Company, who, as chairman and director of the Company, stated at a general meeting of the body, that the Company had no funds to meet the claims against the Company, one of those claims being the judgment debt of the plaintiff.

(a) That section enacts, “that in equity, shall have been issued if any execution, either at law or against the property or effects of

It appeared from the affidavits, that the Company was incorporated by the 9 & 10 Vict. c. ccclx., which embodied the Companies Clauses Consolidation Act, and the several Acts relating to railways. The plaintiff had sued the Company in the present action, to recover from them a certain amount, alleged to be due from them to him, as their local agent. On the 14th of July, 1849, a judge's order was made by consent, to stay all further proceedings in the action on payment of a certain sum, and in default of such payment the plaintiff was to be at liberty to sign judgment and issue execution for the whole amount, with costs, &c. In July following, default was made, and final judgment was signed for the sum of 1140*l.* 8*s.* 2*d.*, and a writ of *fi. fa.* was issued into the county of Surrey, to which there was a return of *nulla bona*; and to a testatum, which was thereupon issued into Middlesex, there was a like return. On the 23rd of January, 1850, an agreement was entered into between the plaintiff and the Company, that the former should receive payment of his debt by certain instalments; and that a copy of the register of shareholders in the Company should be supplied to him; and that, in case of default in payment of any one of the instalments, he should be at liberty to take proceedings against the shareholders. The first of these instalments alone was paid,

1850.
 DEVEREUX
v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY CO.
In re
 EMERY.

the Company, and if there cannot be found sufficient whereon to levy such execution, then such execution may be issued against any of the shareholders, to the extent of their shares respectively in the capital of the Company not then paid up: provided always, that no such execution shall issue against any shareholder except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted, made upon motion in open

Court, after sufficient notice in writing to the person sought to be charged; and, upon such motion, such Court may order execution to issue accordingly; and for the purpose of ascertaining the names of the shareholders, and the amount of capital remaining to be paid up on their respective shares, it shall be lawful for any person entitled to any such execution, at all reasonable times, to inspect the register of shareholders without fee."


1850.
 }
 DENVERUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY CO.
 In re
 EMERY.

and the present application was made to obtain the balance still remaining due to the plaintiff. It appeared, that Mr. Emery was a shareholder in the Company, and was one of its first directors; and that he was the chairman at a half-yearly meeting of the Company, held on the 30th of August, 1850, when a report was read, stating, (*inter alia*) that, in consequence of calls not having been duly responded to, the directors were unable to free the Company from its pecuniary engagements; that two judgments had been obtained against the Company, one of which was the present, and the other was one at the suit of a person named Hitchings; and that, as the directors were unable to satisfy these demands, no alternative was left them but to allow the creditors to take such steps as they might be advised, to obtain the amount of these judgments. On moving the adoption of this report, it was stated by Mr. Emery himself, that if the shareholders had paid up the calls, they would have had ample funds in hand to meet all liabilities of the Company; but that, as it was, the Company had not sufficient funds in hand to provide for these judgments.

Peacock in support of the motion.—It is submitted that the present form of application is the correct one. It has been very recently decided by the Court of Common Pleas, in *Hitchings v. Kilkenny, &c., Railway Company* (a), that the Court will not allow execution to issue against a shareholder in a case like the present, except by *scire facias*. [*Parke, B.*—The wording of this statute, and that of the Banking Act, 7 Geo. 4, c. 46, s. 13, is certainly not the same. Like the Banking Act, it provides that no execution shall issue against individual members of the Company, except upon an order of the Court “made upon motion in open Court, after sufficient notice in writing to the persons

(a) 20 L. J., C. P., 31.

sought to be charged." It does not, however, stop there, but contains the following further words, which are not to be found in the previous Act, viz. "and upon such motion such Court may order execution to issue accordingly." But then, on the other hand, it does not adopt the clear and decisive language of the Joint-stock Companies Act, 7 & 8 Vict. c. 110, s. 68, which says, that execution may issue by leave of the Court, "without any suggestion or scire facias in that behalf." It is to be presumed that the legislature knew what they had done the preceding year, and they do not say in this statute, that there shall be no necessity for a scire facias.] It seems, from the recent decision in the Common Pleas, and from that of *Bartlett v. Pentland* (a), that a scire facias is the proper form of remedy.

1850.

 DRYDEN
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY CO.
In re
 EMERY.

The Court having granted a rule nisi,

Slade shewed cause in the first instance.—This rule ought to be discharged, unless the plaintiff succeeds in establishing four distinct matters to the satisfaction of the Court, so as to entitle himself to the benefit of the provisions of the 36th section. In the first place, he is bound to shew that Mr. Emery is a shareholder in the Company; secondly, he must shew the amount of shares he has in the Company; thirdly, the amount of calls unpaid on those shares; and fourthly, that the Company have no sufficient property on which execution can be levied. All these matters ought to be expressly and distinctly shewn upon the affidavits, and ought not to be left to be collected by mere inference. The case of *The Newry and Enniskillen Railway Company v. Edmunds* (b) shews with what strictness the Courts will construe these enactments. That was an action for calls on shares, and this Court held, that, in

(a) 1 B. & Ad. 704.

(b) 2 Exch. 118.

1850.
DEVEREUX
v.
KILKENNY AND
GREAT SOUTH-
ERN AND
WESTERN
RAILWAY Co.
In re
EMERY.

order to prove a man a shareholder under this statute, his name must be on the *sealed* register; and that, although it was upon the draft register, even with his consent, that was not sufficient, as he might have disposed of his shares before the register was made up. The second and third points may perhaps be put in issue by traverses to the scire facias; but the fourth point is entirely a matter within the discretion of the Court, namely, whether the Company has any property whereon the plaintiff may, by the exercise of due diligence, obtain the fruits of his judgment against the Company, for the return of nulla bona to the writ is a matter of no weight, as it may have been the mere act of the plaintiff's attorney. The Company may have sufficient property in Ireland to satisfy this demand, and the inference to be fairly drawn from the affidavits leads to such a conclusion. They may not indeed have funds in their hands, but they may have a large amount of landed property and stock in Ireland, which may be made available for the purpose of satisfying any debts to which the Company may be liable. [Parke, B.—This subject has been under our consideration upon two occasions, with reference to the true construction of the Banking Act, 7 Geo. 4, c. 46; upon the first occasion we had the case of *Dodgson v. Scott* (a), which came before me. It was there sought to make a prior partner in a bank liable on a judgment against the bank; and with respect to the fact of a person's being a partner, my opinion was, that there could be no doubt that that was a matter to be tried on plea to the scire facias, and that I might, therefore, be less scrupulous in the decision to which I should come; and that the same would apply to the case of a person sought to be made liable as having been a partner at the time of the contract entered into. There, however, there was another question, on which I threw out the intimation that, whether due efforts had

(a) 2 Exch. 457.

1850.
 DEVEREUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY Co.
In re
 EMERY.

been made to enforce the plaintiff's judgment against the parties primarily liable, i. e. the members of the Company for the time being, was a matter altogether for the determination of the Court, and could not be questioned by plea to the scire facias, and, therefore, that I must decide it to the best of my power on the materials brought before me, and I came to the conclusion that sufficient endeavours had been made in that case. Then there is a subsequent case of *The Bank of England v. Johnson* (a), before the full Court, where the question arose; and we were of opinion, that a scire facias under that statute against a member of the Company, at the time of the contract entered into with the plaintiff, ought to state the prior execution against the members of the Company for the time being, and that it was ineffectual. Now, by parity of reasoning, would it be necessary here, under the present statute, to state in the scire facias a prior execution against the goods of the Company, and that there was not sufficient on which to levy?] The defendant could not dispute such matters upon the scire facias, and the Court, therefore, ought to hesitate before it grants such a remedy against a shareholder.

Peacock, in support of the rule.—The object of this application is to make Mr. Emery a party on the record. This can be done only upon certain conditions, which are to be set forth on the writ. But these matters are traversable. Thus, where an executor applies for a scire facias, he must allege in the writ that he is executor, and that allegation is traversable. The allegation, that there is no property of the Company on which the plaintiff could levy execution, might be traversed, and would be like the issue raised on a return of the sheriff, that there were no goods of the defendant in his bailiwick on which he might have

(a) 3 Exch. 598.

1850.
 DEVEREUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY Co.
In re
 EMERY.

levied. [*Alderson*, B.—Under particular circumstances the Court may allow a scire facias to issue; but, in the present case, ought you not to have shewn that you sued in Ireland, and had used your best endeavours to obtain your debt there? The Company may be perfectly solvent in that country, and have a large amount of property.] The presumption is the other way, for the affidavits are uncontradicted, which allege that, at a meeting of the Company, it was stated that they had not any funds by which they were enabled to satisfy the demand.

POLLOCK, C. B.—I think that this rule ought to be made absolute. It is an application on the part of the plaintiff under the 8th Vict. c. 16, s. 36, which received the royal assent in the month of May, 1845. By virtue of that section, the Court has power to award execution against any of the shareholders of a Company “to the extent of their shares respectively in the capital of the Company not then paid up; provided always, that no such execution shall issue against any shareholder, except upon an order of the Court in which the action, suit, or other proceeding shall have been brought or instituted.” We are told that the Court of Common Pleas have very recently decided that execution in the usual form cannot be issued in cases like this, but that a scire facias is necessary. On the present occasion application is made for a scire facias only, and not for execution in any other shape; and it therefore becomes altogether unnecessary to say anything about the decision to which reference has been made. On argument it might turn out that the decision is perfectly well founded, and for the reasons I am about to state. The power given to the Court by the language of the stat. 8 Vict. c. 16, is to order execution, and not to issue a scire facias. I am therefore anxious to state my reasons for thinking we may do so, though we might issue execution if we thought proper.

Inasmuch then as the execution spoken of in this section is to issue upon certain conditions, i. e. certain matters being the foundation for it, it is manifest that the Court must have the power to investigate the truth of those matters advanced as the foundation of the scire facias. It is like the case put by the plaintiff's counsel, of an executor who applies for a scire facias. He must allege that he is executor, and that allegation may be traversed. It appears to me, that inasmuch as the Court has the full power of investigating the truth of such matters, but that these matters, if questioned, may be submitted to the consideration of a jury, it is far better that the investigation should take place by means of a traverse of an allegation to a scire facias, rather than by an issue directed by the Court. Supposing, therefore, that the Court may issue execution, it may also issue a scire facias; and I state this with the view of excluding any inference that I either concur in or dissent from what is stated to be the opinion of the Court of Common Pleas. We are now not asked to issue execution, but a scire facias. I am clearly of opinion that the plaintiff is entitled to have the scire facias. As to the decision of the Court of Common Pleas, to which we have been referred, I think it is extremely possible that the Court did not decide that under no circumstances could they issue execution. If they can issue a scire facias, it is within their discretion to say which of the two they will issue; and on the present occasion, I am by no means satisfied that a scire facias would not be the course best adapted to attain the ends of justice. The question, whether execution might issue or not, certainly forms no part of our judgment; but it may be observed that, in the previous Act of the 7 & 8 Vict. c. 110, which was passed in September, 1844, it expressly enacts, in the 68th section, that the Court on motion or summons may direct execution "without any suggestion or scire facias

1850.
 DEVEREUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY Co.
In re
 EMERY.

1850.
 DEVEREUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY CO.
In re
 EMERY.

in that behalf." In the last statute nothing is said about suggestion or scire facias, and it may be, that the legislature having once expressly enacted in distinct terms that the Court may by leave permit execution to be issued without suggestion or scire facias, and afterwards having used the language of the section before us, that if there cannot be found sufficient property of the Company whereon to levy execution, such execution may be levied against the shareholders by leave of the Court where the suit shall be pending;—it may be, that the course of proceeding to which I have alluded having been once adopted in express terms, the legislature considered it only necessary to use such terms as would lead by implication to the same conclusion. We need not, however, decide that point now; but I could not express my concurrence with the rest of the Court in granting this rule, without guarding against any prejudice to the opinion that execution might issue without the intervention of a scire facias.

PABKE, B.—I am of the same opinion. The only question upon which we are called to express any opinion is, whether a scire facias ought to issue in the present case; and on the affidavits before us I think there is a sufficient case to call on us to issue one. In that scire facias I apprehend it will be necessary to state, according to the impression of this Court in *The Bank of England v. Johnson*, that which must come as preliminary matter, before the Court exercises its jurisdiction at all by issuing a scire facias against a person who has not paid his calls, that execution at law has issued against the property and effects of the Company, and that there has not been found sufficient whereon to levy such execution. That is a preliminary proceeding to give the Court jurisdiction to issue execution against an individual member of the Company. This Court will exercise its jurisdiction according to its view of the necessity for the remedy; and it must be satis-

fied that due pains have been taken to obtain execution upon any property the Company may possess. A *primâ facie* case must, therefore, be made out that there is nothing on which to levy, and upon that we are to exercise our judgment whether a *scire facias* ought to issue. And to exercise that discretion properly in this case, we are to inquire whether the plaintiff's debt could be levied on or satisfied from the Irish property of this Company, as they probably have more in Ireland than in this country. Now, the statement made at the meeting, that the Company had no property at all, is sufficient to warrant us in awarding this proceeding. Undoubtedly, the *scire facias* will state that Mr. Emery is a shareholder in the Company who has not paid up his shares, and also the amount paid on each respective share; all those facts will be stated in the *scire facias*, and are traversable matters, to be decided by a jury. It is enough to say that a *primâ facie* case has been made out. This rule, therefore, must be made absolute.

1850.
 DEVERREUX
 v.
 KILKENNY AND
 GREAT SOUTH-
 ERN AND
 WESTERN
 RAILWAY Co.
In re
 EMERY.

ALDERSON, B.—It is clear that there is *primâ facie* evidence as to the first three points, all three of which may be put in issue by pleas to the *scire facias*. Then, as to the fourth, it was, properly, much argued by Mr. *Slade*, and I thought at one time the argument would be successful, that in order to found the jurisdiction of the Court, we must be satisfied that the point might be raised by *scire facias*, how the party has endeavoured in England to obtain satisfaction for his debt; but that is, in truth, a matter for the discretion of the Court, whether the *scire facias* is to issue, and that must depend on the decision of the question, whether there is reasonable evidence of property elsewhere, which might be made available for payment from the funds of the Company. If, therefore, it had appeared that there was abundance of property in Ireland, which the party might attain by proper application, I should say that under such circumstances we ought not to grant a *scire*

1850.
DEVEREUX
v.
KILKENNY AND
GREAT SOUTH-
ERN AND
WESTERN
RAILWAY Co.
In re
EMERY.

facias. But, as it appears that it was stated by Mr. Emery, at the meeting of the Company, that the Company had no funds whatever, I think the discretion of the Court will be rightly exercised in acceding to the plaintiff's application.

PLATT, B.—I am of opinion that the scire facias ought to go, as otherwise great inconvenience would arise. The facts in litigation between parties ought to be tried by a jury without the intervention of an issue, which is not pointed out by this statute. Facts should not be submitted to the tribunal of this Court; for it is not our duty to try facts, but to expound the law, and facts are for the jury. As to issuing a scire facias in cases like the present, there is no difficulty. A scire facias is, in a certain sense, an original action; but here it is in truth a continuation of the original cause of action—it is a scire facias on a judgment, which is a continuation of the old cause, giving the party against whom it takes place an opportunity of traversing the facts therein stated. I think, therefore, that this scire facias should go; the facts before us are, in my judgment, quite sufficient to award this proceeding. My learned brothers have sufficiently stated the grounds upon which they found their opinions, and I can only add that I agree in the opinions so expressed. The rule, therefore, will be absolute.

Rule absolute.

1850.

HARVEY v. HUDSON.

Nov. 16.

CASE against the keeper of the Queen's Prison. The declaration stated, that the plaintiff had recovered judgment in this Court against one William Port Hallows, for a debt of 20*l.* 7*s.* 3*d.*, with 24*l.* 19*s.* 8*d.* costs, &c.; that, at the time of the judgment, Hallows being a prisoner in the Queen's Prison, of which the defendant was then the keeper, in execution at the suit of one W. G. Smith, the plaintiff sued out a habeas corpus ad satisfaciendum directed to the defendant, commanding him to have the body of Hallows before the Barons of the Exchequer on the 15th of April, 1850, to satisfy the plaintiff his debt and damages; that the writ was delivered to the defendant on the 28th of March, 1850, whilst Hallows was in his custody; but that the defendant, instead of obeying the said writ, suffered Hallows to be at large, and had not his body according to the exigency of the said writ, but falsely alleged that Hallows was entitled to be at large, and returned to the Court that Hallows was discharged out of the defendant's custody by virtue of a warrant of the Court of Insolvent Debtors, dated the 8th of April, and that Hallows was not in custody at the suit of the plaintiff, nor had he surrendered or been produced before the Barons of the Exchequer.—Plea, not guilty "by statute;" upon which issue was joined.

At the trial, before *Martin*, B., at the London Sittings in the present Term, it appeared that the defendant was the keeper of the Queen's Prison, and that Hallows had been in the defendant's custody at the suit of the plaintiff under a writ of *ca. sa.* issued out of the Palace Court; but

vered to the keeper before he had discharged the party, but returnable after such discharge:—*Held*, also, that such defence was admissible under a plea of not guilty "by statute," under the 110th section of the 1 & 2 Vict. c. 110.

Quære, whether an adjudication of the Insolvent Debtors Court, in a form similar to that of the warrant, is good.

A warrant or order under the 1 & 2 Vict. c. 110, issued out of the Insolvent Debtors Court, dated 8th of April, 1850, was directed to the keeper of the Queen's Prison, and ordered that a prisoner therein named should be "discharged forthwith as to the detainer of S.," and, as to the detainer of H., "at the period of three calendar months from the 7th of January, 1850," (the date of the vesting order):—*Held*, that the instrument was, in effect, an order to the gaoler to discharge the prisoner *forthwith*, and that he was bound to obey the order:—*Held*, also, that such order was a good defence to an action for not bringing up the party under a habeas corpus, delivered

1850.
HARVEY
v.
HUDSON.

that, on the 2nd of January, Hallows signed his petition for his discharge, under the 1 & 2 Vict. c. 110, s. 35; on the 7th January, the vesting order was made, and on the 4th of March the insolvent filed his schedule. On the 27th of March, the plaintiff sued out a habeas corpus ad satisfaciendum returnable on the 15th of April. On the 8th of April the petition came on for hearing, when the Insolvent Court made the following adjudication:—"It is adjudged and ordered, that the said prisoner shall be discharged from custody, and entitled to the benefit of the said Act forthwith as to the several debts and sums of money due or claimed to be due on the 7th of January, 1850, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf, from the said prisoner to the several persons named in the schedule as creditors or claiming to be creditors for the same respectively, or for which such persons gave credit to the said prisoner before the said time of making such vesting order, and which were not then payable, and as to the claims of all other persons not now known to the said prisoner, who may be indorsees or holders of any negotiable security set forth in the said schedule so sworn as aforesaid: excepting as to a certain debt due from the said prisoner to Joseph Harvey (the plaintiff), and also as to a certain other debt due from the said prisoner to J. D. Davis. And forasmuch as it appears to the said Commissioner that the said prisoner hath put the said J. Harvey to unnecessary expense by a vexatious defence to a suit for the recovery of his debt, it is adjudged and ordered, that the said prisoner shall be discharged from custody, and entitled to the benefit of the said Act, as to the said J. Harvey, so soon as the said prisoner shall have been in custody at the suit of the said J. Harvey, creditor for the same debt, for the period of three calendar months, to be computed from the said time of making such vesting order as aforesaid. And forasmuch as it appears to the said

Commissioner, that the said prisoner hath contracted the debt with the said J. D. Davis by means of false pretences, it is adjudged and ordered, that the said prisoner shall be discharged from custody, and entitled to the benefit of the said Act, as to the said J. D. Davis, as soon as the said prisoner shall have been in custody at the suit of the said J. D. Davis, creditor for the same, for the period of eighteen calendar months, to be computed from the said time of making such vesting order as aforesaid." On the same 8th of April, no detainer having been lodged against the prisoner at the suit of J. D. Davis, the following warrant was directed to the defendant:—

1850.
HARVEY
v.
HUDSON.

"Gaoler's Warrant, } " Upon adjudication duly made herein
Forthwith and at } it is ordered, that the said prisoner
a future period." } shall be discharged from your custody
forthwith, as to the detainer of W. G. Smith; and that the said prisoner shall be discharged from your custody as to the detainer of J. Harvey at the period of three calendar months, *to be computed from the 7th day of January, 1850*, being the time of making the order vesting the estate and effects of the said prisoner, pursuant to the statute in that behalf; and for so discharging the said prisoner from custody, as to the several detainers respectively, this shall be your sufficient warrant."

" By the Court."

This warrant was lodged with the defendant at the Queen's Prison on the 9th of April, and on the same day the defendant discharged the prisoner in obedience to the warrant. On the 15th of April the defendant made a return to the writ, that Hallows was discharged out of his custody as to the detainer of the plaintiff on the 9th of April by a warrant of the Insolvent Debtors Court.

Upon this state of facts, it was objected on the part of the plaintiff, first, that this evidence was not admissible under the plea of not guilty "by statute;" and secondly, that, assuming the evidence to be admissible, both the war-

1850.
HARVEY
v.
HUDSON.

rant and the adjudication were bad, and afforded the defendant no defence to the action. The learned Judge, however, was of a contrary opinion upon both points, and told the jury that the defendant was bound to obey the warrant, which, in his opinion, was good. A verdict having been found for the defendant—

Badeley now moved for a new trial, on the ground of misdirection.—The adjudication and warrant did not afford the defendant any justification for his disobedience to the writ of habeas corpus. In the first place, the adjudication is bad upon two grounds: it is insensible upon the face of it, and it does not comply with the provisions of the statute under the authority of which it is professed to be framed. It is altogether insensible, for it orders the debtor to be imprisoned at the suit of the plaintiff for three calendar months from the date of the vesting order, that period having expired at the date of the adjudication. It is therefore an order to imprison a party at a future period, when, at the time the order is made, the period has elapsed. The adjudication is also bad, for, by the 76th section of the 1 & 2 Vict. c. 110, the Commissioner may discharge a prisoner forthwith, or as soon as he shall have been in custody, *at the suit* of one or more of the persons as to whose debts and claims such discharge is adjudicated, for a period of not more than six months. But in the present case the debtor had not been in custody at the suit of the plaintiff; for a writ of habeas corpus *ad satisfaciendum* had been lodged by the plaintiff, and that proceeding is not a writ of execution. [*Parke, B.*—You had better direct your argument to the question as to the validity of the warrant, as the officer is only bound to notice the warrant, and not the adjudication: *Thomas v. Hudson (a).*] The warrant is bad, for like the adjudication it is insensible; for it orders that

(a) 14 M. & W. 353.

1850.
 HARVEY
 v.
 HUDSON.

the prisoner be discharged forthwith, and also at a future period to be computed from a time which is past. It is therefore void, and affords no justification to the defendant: *Watson v. Boddell* (a). By the 76th section of the 1 & 2 Vict. c. 110, the Insolvent Court has power to discharge a prisoner either "forthwith or so soon as" he has been in custody at the suit of a creditor for any period not exceeding six months; and the 77th and 78th sections give the power of imprisonment to the extent of three years under certain circumstances. Now, as these powers are given in the alternative, the Court must decide at which of the two periods the debtor is to be discharged. [*Parke, B.*—The language of the warrant directs, although in a somewhat verbose and periphrastic manner, the gaoler to discharge the debtor forthwith, at the same time stating that the party has been in custody for a certain period. *Alderson, B.*—It is the duty of the gaoler to look to the warrant alone, and to obey it. The expression in the warrant is equivalent to a direction to him to discharge the debtor forthwith, and that he is bound to do. The objection, that the day of discharge is to be computed from a day that is past, would apply to many sentences passed at the assizes, when, upon a day some time after the commencement of the assizes, a prisoner is ordered to be imprisoned for one day, which is in effect an order for his immediate discharge.] Secondly, this evidence was not admissible under the defendant's plea. The 110th section of the 1 & 2 Vict. c. 110, provides that, if any action is brought against the gaoler for an escape or for not performing the duty of his office in pursuance of that Act, he may plead the general issue, and give the special matter in evidence. That provision does not apply to this defence, for the action is brought for disobedience to a writ of a superior Court. [*Alderson, B.*—If, as was contended in one part of the argument, the debt-

(a) 14 M. & W. 57.

1850.
HARVEY
v.
HUDSON.

or was not in the defendant's custody, the general issue alone, without the aid of this provision in the statute, would be sufficient; for in such case the defendant would not be guilty of any breach of duty, as the officer is not bound to obey the writ, unless he has the party in his custody.] It was the defendant's duty to have obeyed the writ. It was not necessary that the debtor should be in custody; he might have put in bail for his appearance.

POLLOCK, C. B.—In all cases in which there is any doubt, this Court is in the constant habit of granting a rule; but where there is no doubt whatever, as in the present case, the better course is to express our opinion at once upon the matter; and I am clearly of opinion that there ought to be no rule. This is an action against a gaoler for a false return to a writ of habeas corpus, to which the defendant has pleaded the general issue by statute. There are two substantial questions which we have to decide. The first question is, whether the facts, as they appeared at the trial, afford a good answer to this action; and secondly, whether it was competent to the gaoler to avail himself of the defence so disclosed under the plea of the general issue by statute. Now, with respect to the latter point, I am not certain that the defendant might not have given this matter in evidence wholly irrespective of the protection which the statute affords him, by allowing him to plead the general issue, and to give his defence under it; for, by the New Rules, the plea of not guilty in an action on the case operates as a denial of the breach of duty or wrongful act alleged to have been done by the defendant; and therefore the simple plea of not guilty would probably have been sufficient for the defendant's purpose. But it is not necessary to give any decisive opinion upon that point, for the 110th section of the 1 & 2 Vict. c. 110, expressly enacts, that in an action against the keeper of any prison for not performing the duty of his office in pursuance of the Act, he may plead

the general issue, and give the Act and special matter in evidence. Upon the other question, Mr. *Badeley* in his argument called our attention to the distinction between the terms "forthwith" and "at a future period;" and for this purpose he cited several of the sections of the Act; but, in truth, I do not find any such distinction whatever made in the Act. It is true, that in the margin of the warrant the words "forthwith and at a future period" appear, but they form no part of the warrant itself. Now the word "future" has no reference to the time when the warrant issued, but to the date of the vesting order; and, by the enactments of the statute, the Insolvent Court may adjudge and discharge the insolvent either forthwith, or at a time to be computed with reference to the date of the vesting order. The adjudication has nothing to do with the present case. The gaoler was protected by the warrant, which directed him that the discharge of the prisoner, as to the detainer of the plaintiff, should take place at the end of three calendar months, to be computed from the 7th of January, 1850. At the time when that warrant was placed in the defendant's hands, that period had elapsed. I do not think that we are called upon to speculate whether the Commissioner had adopted the proper form of adjudication, for there was a warrant in existence which required the gaoler to discharge his prisoner at once; and he was, therefore, completely justified in discharging him. But then it was said, that the gaoler ought to have taken bail for him, or to have had him before the Court, in obedience to the writ of habeas corpus. But I think that he had no power to take bail; and that if he had done so, he would have subjected himself to an action, which might have resulted in the recovery of very severe damages against him. As to taking the debtor again into custody after he had discharged him, I am clearly of opinion that he could not have done so; for, in the case of discharge from custody, the rule would be the same as it would be in case he had become a peer or

1850.
HARVEY
v.
HUDSON.

1850.
HARVEY
v.
HUDSON.

member of Parliament, for the writ which orders his discharge prevents the gaoler from obeying the writ of habeas corpus. The gaoler has no longer any power over him. For these reasons there ought to be no rule.

PARKE, B.—I am of the same opinion, and I entertain no doubt whatever upon the matter. There are in reality three questions which Mr. *Badeley* has raised in this case. First, whether the defendant was justified in discharging the debtor out of custody. Secondly, whether the defence was admissible under the plea of the general issue by statute. And thirdly, whether the defendant ought, notwithstanding the warrant of the Insolvent Court, to have brought up the debtor at the return of the writ of habeas corpus. With respect to the first of these questions, I think that it is disposed of by the case of *Thomas v. Hudson*, in which it was decided that a gaoler is protected by the warrant, which alone he is bound to look at and to obey. Then comes the question, whether the warrant is void. I think that it is not. When its meaning is properly considered, it is in effect an order for the *immediate* discharge of the prisoner. The document is drawn up inartificially, and the mode in which its object is effected is no doubt somewhat clumsy and ill-contrived. But I think that, in effect, it states that the period of three months mentioned in it had expired before the date of the warrant. If the warrant were altogether void, the officer would not be protected in law. A doubt occurred to my mind in the course of the argument, whether there was not an error upon the face of the warrant—whether, under the 76th section, the Commissioner had any other power than to discharge the prisoner “forthwith;” or, in case the prisoner should be actually in custody, then to discharge him at a certain period; and consequently, that the Commissioner had no such power as that which is assumed in the warrant, namely, of discharging him at a

1850.
 HARVEY
 v.
 HUDSON.

future period, as the party was not in actual custody. But it is clear that the legislature intended that the party might be discharged at a future period, although he might not be in actual custody at the time of the adjudication. [His Lordship read the 85th section of the 1 & 2 Vict. c. 110, and proceeded:] Now, taking both these sections together, it appears to me to be clear that the Commissioner has power to discharge the party, either forthwith or at a future period. That was the doubt I at one time entertained as to the construction of the 76th section; but I feel no longer pressed by that doubt. The warrant amounts to a clumsy direction to the gaoler to discharge the debtor forthwith; and therefore the defendant acted rightly, and is justified, in the same way as a sheriff would have been in discharging a party out of his custody. With regard to the second question, I think the defendant was fully at liberty to avail himself of this defence under the plea he placed on the record, by virtue of the provisions of the 110th section of the Act. Lastly, with respect to the objection, that the defendant was bound to have the prisoner at the return of the writ, I think that is of no weight. He could bring him up if he were in lawful custody; but he was under no obligation whatever, after the debtor was discharged from his custody, to search for him and bring him up at the return of the writ.

ALDERSON, B.—I am of the same opinion. If it were necessary for us to determine whether this adjudication is wrong or not, I should be disposed to say that the Act of Parliament had not been properly pursued by the Commissioner; for I am inclined to think that the word “future” in the Act means at some time when, if the insolvent is out of custody, the creditor may arrest him and detain him till the expiration of the specified time. But the question here, whether the gaoler has done his duty, is a very different one. He has to look at the war-

1850.
HARVEY
v.
HUDSON.

rant only, and not to the adjudication. We must, therefore, look at the warrant; and by the directing part of that instrument—for the marginal note forms no part of it—we see that, as to the detainer of Harvey, the prisoner is to be discharged from the defendant's custody at the period of three months, to be computed from the 7th of January. This is only a periphrastic and wordy mode of expression, the effect of which is to order the prisoner's discharge *forthwith*, and that course the gaoler was bound to take. With respect to the question of pleading, I doubt whether, even without the assistance of the Act of Parliament, the defence in this case could not have been given in evidence under the general issue. If the order were absolute, for the defendant to bring up the body of the debtor, the defendant would have to give an excuse for not obeying the order, and that excuse he would have to plead specially. But if the effect of the order were merely to direct the defendant to bring up the body of the debtor, provided the debtor were in his custody, then there was no breach of duty, and the defence might be given in evidence under the general issue, without the intervention of the statute. But we are not called upon to give any opinion upon that point; for it is enough to say that, in this case, the defendant has obeyed the order of the Insolvent Court, and that such defence may be given in evidence under the general issue by the 110th section of the Act, which places the matter beyond all doubt.

MARTIN, B., concurred.

Rule refused.

1850.

THE LONDON AND NORTH WESTERN RAILWAY COMPANY v.

Nov. 7.

M'MICHAEL.

DEBT for calls. The defendant pleaded, first, that he was not indebted *modo et formâ*; and secondly, that he was not the holder of the shares. Issues thereon.—At the trial of the cause, before *Cresswell*, J., at the last Liverpool Summer Assizes, the register of the shareholders of the Company, bearing the seal of the Company, and produced from the office of the secretary of the Company, was offered in evidence on the part of the plaintiffs. The admissibility of this document was objected to, on the ground that it ought also to have been shewn that the seal was affixed at a meeting of the Company, pursuant to the provisions of the 9th section of the 8 & 9 Vict. c. 16. The learned Judge, however, overruled the objection, and admitted the document. The plaintiffs having obtained a verdict,

Under the 8 & 9 Vict. c. 16, s. 28, the register of shareholders, having thereon the seal of the Company, is admissible in evidence, without proof that the seal was duly affixed to the document at an ordinary meeting of the Company, in pursuance of the provisions of the 9th section of the Act.

Cleasby now moved for a rule nisi to set that verdict aside, and for a new trial, on the ground that the evidence was improperly received. The mere production of the register was not sufficient to make it admissible in evidence. It is true that the 27th section of the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, enacts, that, in actions for calls, "it shall be sufficient to prove that the defendant, at the time of making the call, was a holder of one share or more in the undertaking, and that such call was in fact made, and notice thereof given as is directed by this and the special Act; and it shall not be necessary to prove the appointment of the directors who made the call, or any other matter whatsoever." And the 28th section, upon which the plaintiffs relied, proceeds "to enact that the production of the register of shareholders shall be *primâ facie* evidence of the defendant being a shareholder, and of the number and amount of his shares." But the

VOL. V.

K K K

EXCH.

1850.
 LONDON AND
 NORTH
 WESTERN
 RAILWAY CO.
 v.
 M^CMICHAEL.

9th section enacts that "the Company shall keep a book, to be called the 'Register of Shareholders;' and in such book shall be fairly and distinctly entered, from time to time, the names of the several corporations, and the names and additions of the several persons entitled to shares in the Company, together with the number of shares to which such shareholders shall be respectively entitled, distinguishing each share by its number, and the amount of the subscriptions paid on such shares; and the surnames or corporate names of the said shareholders shall be placed in alphabetical order; and such book shall be authenticated by the common seal of the Company being affixed thereto; and such authentication shall take place at the first ordinary meeting, or at the next subsequent meeting of the Company, and so from time to time at each ordinary meeting of the Company." This section requires the instrument produced to be the complete register, and therefore it requires proof that the seal of the Company was affixed at an ordinary meeting of that body; and unless such proof be given, the 28th section does not make the document admissible.

POLLOCK, C. B.—If such an argument were to be allowed to prevail, it is difficult to see where the matter would stop; for it would be contended, upon the first opportunity, that the meeting at which the seal was affixed ought to be shewn to have been properly convened; and, after that, some further proof might be insisted upon for the purpose of establishing some additional matter. The *production* of the register is sufficient: that is clear.

ALDERSON, B.—The objection is a novel one, for this proof has been admitted over and over again.

PARKE, B., concurred.

Rule refused.

1850.

NYSSEN v. RUYSENAERS. .

Nov. 23.

MANISTY had obtained a rule in this case, calling on the defendant to shew cause why the sum of 30*l.*, deposited by the defendant with the sheriff of Middlesex, on his arrest, and since paid into Court, should not be paid out to the plaintiff or his attorney, subject to such deduction from the sum of 10*l.*, parcel thereof, as by taxation by the Master of the plaintiff's costs of this action should be deemed reasonable. The defendant had been arrested on a *capias*, issued in pursuance of a Judge's order, under the stat. 1 & 2 Vict. c. 110, but was discharged out of custody upon depositing with the sheriff of Middlesex the sum of 30*l.* in lieu of bail, being the amount for which the writ was indorsed, and 10*l.* for costs, under the 43 Geo. 3, c. 46, s. 2. No further proceeding had been taken.

Where a party arrested by *capias* under the 1 & 2 Vict. c. 110, deposits money with the sheriff, under the 4th section, which is paid into Court, and neglects to take any further steps, the plaintiff is entitled to take the amount (subject to taxation) out of Court, without awaiting the final determination of the suit.

Barnard shewed cause.—The question is, whether the plaintiff is entitled to have this money paid to him out of Court at the present time, or whether he ought not to wait until he has obtained judgment, or the suit has been otherwise legally determined; and, therefore, whether the 7 & 8 Geo. 4, c. 71, s. 2, applies to the present case. [*Alderson*, B. —The 4th section of the 1 & 2 Vict. c. 110, says, “and such defendant, when so arrested, shall remain in custody until he shall have given a bail-bond to the sheriff, or shall have made deposit of the sum indorsed on such writ of *capias*, together with 10*l.* for costs, according to the present practice of the said superior Courts; and all subsequent proceedings, as to the putting in and perfecting special bail, or of making deposit and payment of money into Court instead of putting in and perfecting special bail, shall be according to the like practice of the said superior Courts, or as near thereto as the circumstances of the case will permit.” How could the plaintiff obtain his demand except

1850.
 NYSSON
 v.
 RUYENNAERS.

by this proceeding? *Parke, B.*—The 4th section says, that “all subsequent proceedings shall be according to the like practice of the superior Courts.” It was the practice, where money was paid in under the 43 Geo. 3, c. 46, s. 2, in lieu of bail to the sheriff, to permit the plaintiff to take it out of Court, if the defendant did not put in and perfect special bail in due time.] It was not intended that the defendant should give an additional security of 10*l.*, or that the plaintiff should be at liberty to take the money out of Court.

Manisty, in support of the rule, was not called upon.

PER CURIAM (a).—Unless the further sum of 10*l.* be paid into Court, the rule must be absolute.

Rule absolute (b).

(a) *Pollock, C. B., Parke, B., Alderson, B., and Platt, B.*

(b) See *Tuton v. Gale*, 1 Dowl. N. S. 383.

Nov. 23.

TURNER v. BERRY.

Under the 129th section of the 9 & 10 Vict. c. 95, if a party sues in a superior Court, and his demand is reduced below the sum of 20*l.* by proof of part payment, he is not entitled to costs, unless the Judge before whom the cause is tried certifies that the action is fit to be brought in the superior Court.

O'MALLEY had obtained a rule in this case, calling on the plaintiff to shew cause why a suggestion should not be entered, to deprive him of costs, under the 9 & 10 Vict. c. 95, s. 129. It was an action of debt for work and labour and goods sold, to which the defendant pleaded the general issue and payment. The plaintiff claimed the sum of 35*l.*, after admitting certain payments in his particulars of demand. At the trial, before *Patteson, J.*, at the last Buckinghamshire Summer Assizes, the plaintiff proved his demand; but the defendant proved several payments, by which the amount was reduced to 16*l.* 9*s.* 11*d.*; and for that sum the plaintiff obtained a verdict. The plaintiff had not obtained the Judge's certificate that the case was fit to be brought in a superior Court.

1850.
TURNER
v.
BERRY.

Griffiths shewed cause.—The question is, whether the 58th section of the 9 & 10 Vict. c. 95, gives the county court jurisdiction in a case like the present, where the claim exceeds the sum of 20*l.*, although the amount recovered, after being reduced by part payments, is below that sum. By the 58th section, the county court obtains jurisdiction over “all pleas of personal actions, where the debt or damage claimed is not more than 20*l.*, *whether on balance of account or otherwise.*” It is apprehended, that the words “balance of account” do not apply to a case like the present, where the claim might have been for a sum of 10,000*l.*, but which by many complicated proofs of payment might be ultimately reduced below 20*l.*; but that the provision applies to the case where the parties have stated an account. [*Pollock*, C. B.—Even there the account might be re-opened, and the proof might be quite as complicated.] In *Harsant v. Larkin* (a), which was a decision under the old Court of Requests Act, and where the Court had jurisdiction to the amount of 40*s.*, *Dallas*, C. J., said, that “The plaintiff’s original debt was not to be referred to the verdict of the jury, but whether he had a fair, reasonable, and probable cause for litigating the question whether his demand amounted to more than 40*s.* or not.” [*Pollock*, C. B.—In that case the 48 Geo. 3, c. 51, by the 1st section of which Act the jurisdiction of the inferior courts was extended to sums not exceeding 5*l.*, contained a section (sect. 13), by which any sum was excepted being the balance of an account or demand originally exceeding 5*l.*] In *M’Collam v. Carr* (b) the Court refused to allow a suggestion for double costs under the Middlesex County Court Act, 23 Geo. 2, c. 33, where the original debt was originally above 40*s.*, but had been reduced below that sum by a balance. *Eyre*, C. J., there said, “The action arises on a contract, part of which has been satisfied by money

(a) 7 Moo. 68.

(b) 1 B. & P. 223.

1850.
 TURNER
 v.
 BERRY.

on account. Is there any case where, the ultimate balance of an account only being under 40s., the Court has allowed a suggestion? I should pause upon such a case, since the most intricate points in accounts between merchant and merchant might by this means come to be decided by a county court." In the recent case of *Woodhams v. Newman* (a) the Court of Common Pleas held, that the 129th section of the 9 & 10 Vict. c. 95, does not apply where the debt originally exceeding 20*l.* has been reduced below that sum by a set-off. [*Pollock*, C. B.—I think that the words "on balance of account" mean the balance of an account as struck at an investigation before the Court. It is contended, that this will enable the county court to try questions of disputed accounts; but even supposing those words were understood with reference to an account stated, the balance struck is not conclusive on the parties, as errors in the account might be shewn.] The same argument would equally apply in the case of a set-off. [*Pollock*, C. B.—A set-off is a very different thing, for it is in the nature of a cross action; and you cannot compel a man to set off his claim, or accept credit for it against another. *Alderson*, B.—If the parties were to agree, before the action were brought, that certain demands due by the one side should be set off against the other, the set-off would become a payment. *Parke*, B.—The words in the 58th section, "whether on balance of account or otherwise," are well explained by my brother *Maule* in *Woodhams v. Newman*, where he says that they mean this, "Suppose a claim to be preferred in the county court for a sum below 20*l.*, and it appears that the debt originally exceeded 20*l.*, but has been reduced by payment or otherwise before action brought, the defendant shall not be entitled to say, that the case is without the jurisdiction of the county court, because the debt originally exceeded 20*l.*:" and the difference in this respect between payment and set-off is exceedingly well explained by my late brother

Coltman in the same case, thus:—"The cases decided upon the old Courts of Requests Acts seem to me to have a very considerable bearing upon this question. The principle they furnish is, that these inferior courts, which were established for the recovery of debts and demands of small amount, are not to assume to themselves jurisdiction in a case which, in point of fact, involves the decision of two several actions of large amount. The words of the 58th section, which give the jurisdiction, give it in cases 'where the debt or damage claimed is not more than 20*l*., whether on balance of account or otherwise.' The cases undoubtedly shew that the sum claimed is in general to be measured by the amount recovered by the verdict. But those were cases where the amount *really due* was shewn before the jury to be less than the sum for which the plaintiff originally went, and not cases where the demand was reduced by a claim of set-off. They do not, therefore, apply to this case. I think this is a matter for which the plaintiff could not have levied a plaint in the county court, and, if so, it is idle to contend that he was precluded from suing in the superior Courts." The words "whether on balance of account or otherwise," are not to be found in the County Courts Extension Act, 13 & 14 Vict. c. 61. The statute was passed for the benefit and protection of poor persons, and for the recovery of small debts, and not to give an unlimited power to investigate open accounts to any amount, however great. The 58th section ought therefore to be understood as applying to the balance of an account stated and settled between the parties, which creates a new debt easy of proof.

O'Malley, in support of the rule, was not called upon.

POLLOCK, C. B.—I am of opinion that this rule ought to be made absolute.

PARKE, B.—I am of the same opinion. Where the plaintiff's demand is reduced below 20*l*., and he brings his ac-

1850.

TURNER
v.
BERRY.

1850.

TURNER

v.

BERRY.

tion in the superior Court, he ought in general to pay the costs; but if, as undoubtedly might be the case, the proof of those payments involve difficult investigations, the Judge will set the matter right by granting his certificate.

ALDERSON, B.—The debt is the balance to which the plaintiff is truly entitled.

Rule absolute

Nov. 21.

JONES v. JOHNSON and MORGAN.

The council of the borough of L., previously to mak-

REPLEVIN of certain goods and chattels of the plaintiff.
Plea (by statute) Not guilty. Avowry:—That the goods made an estimate under the 5 & 6 Will. 4, c. 76, s. 92, which estimate contained (amongst others) the two following items:—"Compensation to the late town clerk, three years and a half, 105l. 14s. 10d., law expenses 800l." The first of these items was, as it expressed, an award of compensation to a former town clerk, who had been dismissed from his situation by the corporation. The second item had been included in the estimate to meet the demand of the attorney to the corporation for costs and disbursements. The attorney had paid the sum of 467l. to a party to save the corporation from an execution; and this sum was one of the items included in the charges as a disbursement. At the time the estimate was made, the attorney had not delivered any signed bill of costs to the corporation. The council afterwards made a borough rate, which included the sums so mentioned in the estimate. At a meeting, which was not a public one, the borough council made an order, which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor rates made and collected; and they also issued a warrant to their treasurer, commanding him, within one hundred days from the date thereof, to demand from the overseers the said proportions. The treasurer issued his precept to the overseers, requiring them, within one hundred days after the receipt thereof, to pay the proportions out of the poor rates made and collected, or to be made and collected. A warrant was issued by the defendants, one of whom was the mayor of Lichfield, and both justices of the borough, against an overseer who had not paid the proportion assessed in his parish. This warrant contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if within the space of five days next after such distress by you taken, the sum of &c. shall not be paid, then you do sell the said goods:" and concluded thus:—"Given under our hand and seal, and under the corporate seal of the said borough city. T. T. (t. s.), M. B. M. (t. s.), Justices of the said borough and city. Thomas (Corporation seal) Johnson, Mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough:—*Held*,

First, that a borough rate is valid, though not made in public.

Secondly, that, assuming the rate to be retrospective (which, *semble*, it was not), yet being good upon the face of it, no objection to its validity was open as against the defendants.

Thirdly, that the warrant was good notwithstanding it directed the sum to be paid out of the rates to be made and collected; and, fourthly, that it was good, although it directed the overseers to pay the sum within one hundred days after the receipt of the warrant.

Fifthly, that it sufficiently appeared upon the warrant, that one of the defendants was mayor of the borough at the time of making the warrant.

Sixthly, that the warrant of distress appeared to have been issued within the jurisdiction of the mayor and justices, as the venue in the margin might be looked at for that purpose; and,

Seventhly, that the warrant was sufficient under the 27 Geo. 2, c. 20, although it did not fix the time for termination of the sale.

An action of replevin is maintainable against a person who improperly issues the warrant under which another's goods are distrained.

were taken under a warrant of distress issued by the defendants, two justices of the borough of Lichfield, for non-payment of borough rate, "publicly assessed" by the council on a parish within the borough, of which the plaintiff was one of the overseers.

Plea in bar—*De injuria*: upon which issue was joined.

At the trial, before *Coltman*, J., at the Stafford Spring Assizes, 1849, a special verdict was found (so far as is material) as follows:—The borough and city of Lichfield is an ancient borough, and one of the boroughs mentioned in schedule A, annexed to the 5 & 6 Will. 4, c. 76. After the passing of that Act, there was, and from thence hitherto hath been and still is, a body corporate of the said borough, by and under the name of "The Mayor, Aldermen, and Burgesses of the Borough of Lichfield;" and there was a treasurer of the borough duly appointed in that behalf; and the defendants were, for and during the time aforesaid, two of the justices of the peace of and for the said borough. After the passing of the 1 Vict. c. 81, and before and at the time of the making of the borough rate hereinafter mentioned, the borough fund of the borough was not sufficient for the purposes in the first-mentioned statute in that behalf specified; and on the 19th of July, 1847, a meeting of the council of the borough was held, pursuant to due appointment, notice, and summons, according to the provisions of the 5 & 6 Will. 4, c. 76, ss. 69, 92, but which meeting was not a public meeting, the members of the town council and the reporters of the press only being allowed to be present; and at such meeting the council proceeded to make and did make the rate hereinafter mentioned.—The special verdict then set out the minutes, which, after stating that the council ordered a borough rate to be made on the several parishes within the borough, and that the parish of St. Mary was assessed at 66*l.* 16*s.* 1*d.*, proceeded thus:—"And the council doth hereby, in pursuance of the 1 Vict. c. 81, resolve, order,

1850.
JONES
v.
JOHNSON.

1850.
JONES
v.
JOHNSON.

and direct the churchwardens and overseers of the respective parishes, townships, hamlets, or places (naming amongst others St. Mary), to pay the amount of the part or portion of such rate for which such parishes, townships, hamlets, and places shall respectively be liable, out of the poor rates *made and collected* for such parishes, townships, hamlets, and places, respectively. And the council doth further resolve, that J. Proffit, the treasurer of the said borough and city, do forthwith make a demand in writing on behalf of the council of and from the said churchwardens and overseers of the poor, or any or either of them, of the respective sums hereby assessed and taxed upon such parish, township, &c.; which churchwardens and overseers of the poor are hereby required to levy and pay to the said treasurer of the borough and city such sums so assessed and taxed upon such parish, township, &c., within the space of one hundred days after demand made as aforesaid; and in case such churchwardens and overseers of the poor, or any or either of them, shall refuse or neglect to levy and pay any of the sums hereby assessed and taxed, within one hundred days after demand made as aforesaid, to such treasurer, he shall levy the same by distress of the goods and chattels of such churchwardens and overseers so neglecting or refusing to pay."

The special verdict then set out an estimate of expenses mentioned in the minutes, and which was made at the said meeting of the council. This estimate contained the following amongst other items: "Compensation to the late town clerk, 3½ years, 105*l.* 14*s.* 10*d.*, Law expenses, 800*l.*" The item of 105*l.* 14*s.* 10*d.* was introduced under the following circumstances: One C. Simpson had been town clerk of the borough of Lichfield before and at the passing of the Municipal Corporation Act, and so continued until the year 1844, when he was dismissed from such office by the town council. Whereupon he claimed to be entitled to compensation; and the town council having refused to

assess him any, he obtained from the Court of Queen's Bench a writ of mandamus, to which the council made a return, which C. Simpson traversed; and the litigation resulted in a judgment whereby C. Simpson recovered against the council 467*l.* for damages and costs; and in April, 1846, a peremptory mandamus issued; and in June, 1846, the council awarded compensation to C. Simpson in the shape of an annuity of 30*l.* 4*s.* 3*d.*; but he being dissatisfied therewith had appealed to the Lords of the Treasury, which appeal was still pending at the time of the aforesaid meeting of the council; and the said sum of 105*l.* 14*s.* 10*d.*, being the arrears of the said annuity, was included in the estimate, on the ground that the council might be required to pay the same to C. Simpson.

The item of 800*l.* appearing in the estimate as for law expenses, was introduced under the following circumstances:—One Eggington, the town-clerk of the borough, had been the attorney for the council in the litigation on the writ of mandamus. After C. Simpson had so recovered judgment, and before making the estimate, Eggington, so being such attorney, paid to C. Simpson the sum of 467*l.* out of his, Eggington's, own monies, such sum of 467*l.* being the damages and costs as then ascertained by the Master's allocatur, intending to charge the same to the council as a disbursement in his (Eggington's) bill of costs; but he had not, on the 19th of July, 1847, delivered any signed bill to the council, nor had he been required by them to deliver any, nor had he been required by the council to pay the said sum of 467*l.*, but did so spontaneously, and with a view to save the difficulty and expense of an execution. The item of 800*l.* introduced into the estimate as aforesaid, was so introduced as a sum which, it was estimated by the council, would be required to pay on account of Eggington's bill of costs, charges, and disbursements for that and other suits and business then pending and then unascertained, including

1850
 JONES
 v.
 JOHNSON.

1850.
JONES
v.
JOHNSON.

therein, as a disbursement which they would be required to repay, the 467*l.* so paid by Eggington to the agent of C. Simpson.

On the 19th of July, 1847, a precept or warrant, signed by the mayor of the borough, and sealed with the corporate seal, was, by order of the council, issued to J. Proffit. The special verdict set out the warrant, which commenced thus:—"We, the council of the borough and city of Lichfield, by virtue of an Act passed &c. (5 & 6 Will. 4, c. 76) do hereby command you, J. Proffit, within one hundred days *from the date hereof*, to demand, collect, and receive of and from the churchwardens and overseers of the poor of the several parishes, &c., the several sums (naming them) respectively taxed and assessed upon the said parishes by order of the council towards a borough rate, &c."

Thereupon, Proffit, on the 19th of July, 1847, made his precept to the churchwardens and overseers of St. Mary, which, after reciting the order and warrant of the council, proceeded thus:—"These are therefore to require you, and I do hereby demand, that, within one hundred days *next after the receipt hereof* by you or any of you, or after leaving a written copy at your or any or either of your dwelling-houses, &c., you do pay to me, as such treasurer as aforesaid, out of the poor rates made and collected, *or to be made and collected*, the sum of 666*l.* 16*s.* 1*d.* so rated and assessed on the parish of St. Mary," &c. On the 29th of July, 1847, a written copy of such precept was left at the dwelling-house of, and then received by, the plaintiff, he being one of the overseers of St. Mary.

The plaintiff appealed against the rate, and it was confirmed. Afterwards, the churchwardens and overseers of St. Mary paid to Proffit, on account of the sum of 666*l.* 16*s.* 1*d.*, the sum of 513*l.* but not the residue of that sum. The plaintiff went out of office as overseer on the 30th of March, 1848. On the 11th of July, 1848, being after the expiration of the period of one hundred days, the

plaintiff was summoned before the defendant Thomas Johnston, the mayor of the borough, and the other defendant B. Morgan, a justice of the peace of the borough, upon the complaint of Proffit, to shew cause why a warrant of distress should not forthwith issue, to levy 153*l.* 16*s.* 1*½d.*, the balance of the 666*l.* 16*s.* 1*½d.* On the day named in the summons, the plaintiff attended before the defendants, and promised that the residue should be paid, and did before the 3rd of August pay to Proffit the further sum of 76*l.* on account of the sum of 153*l.* 16*s.* 1*½d.* On the 3rd of August, 1848, being the day to which the further hearing of the complaint was adjourned, the plaintiff did not attend; and on the 10th of August a warrant, which then bore date that day, was signed and sealed by the defendants, and delivered to Eggington, the town clerk, for the purpose of having the corporate seal affixed thereto; and Eggington altered the same, as to the date thereof, to the 14th of August, 1848, and such alteration was made with the assent and direction of the defendants, and the same was afterwards re-signed and re-sealed, and the corporate seal affixed thereto; which warrant is as follows:—

1850.
JONES
v.
JOHNSON.

Borough and City of Lichfield. } “To J. Proffit, of &c., treasurer of the said borough and city,” &c. [After reciting that the parish of St. Mary was by the council assessed at 666*l.* 16*s.* 1*½d.*, and that the churchwardens and overseers were ordered to pay that sum out of the poor rate made and collected, or to be made and collected, it proceeded thus:—]—“And whereas it duly appeareth unto us, two of her Majesty’s justices of the peace for the said borough and city, and one of us being the mayor of the said borough and city, that J. Proffit issued his precept,” &c. [It then recited the service of the precept on the churchwardens and overseers; their neglect to pay the balance; and that they were duly summoned &c., and proceeded thus:—]—“These are therefore to require you forthwith to make and

1850.
 }
 JONES
 v.
 JOHNSON.

levy, the sum of 77*l.* 16*s.* 1½*d.*, being the balance of the sum of 666*l.* 16*s.* 1½*d.*, by distress of the goods of W. Maunder and R. Harris, churchwardens, and E. Jones and J. Gilbert, lately overseers of the poor as aforesaid; and if within the space of five days next after such distress by you taken, the sum of 77*l.* 16*s.* 1½*d.* together with the reasonable charges of taking and keeping the said distress, shall not be paid, that then you do sell the said goods so by you distrained; and out of the monies arising out of such sale, that you detain the said last-mentioned sum, and also your reasonable charges, &c.

“Given under our hands and seals, and under the corporate seal of the said borough and city, this 14th day of August, A.D. 1848.

THOMAS JOHNSON. (L. S.)

M. B. MORGAN. (L. S.)

Justices of the said borough and city.

THOMAS (C. S.) JOHNSON.

Under the above warrant Proffit took the goods and chattels of the plaintiff, and kept the same until they were replevied.

Gray (*Keyser* with him) for the plaintiff.—First, the rate is bad, inasmuch as it was not made at a public meeting. By the Municipal Corporation Act, 5 & 6 Will. 4, c. 76, s. 92, the council of any borough are authorised and required “to order a borough rate, in the nature of a county rate, to be made within their borough; and for that purpose the council of such borough shall have within their borough all the powers which any justices of the peace, assembled at their general or quarter sessions, have, by virtue of the 55 Geo. 3, c. 51, or as near thereto as the nature of the case will admit,” &c. The 55 Geo. 3, c. 51, ss. 1, 12, empower justices of the peace “assembled at their general or quarter sessions,” to make and assess a county rate whenever circumstances appear to require it. There-

fore, by that Act, the rate is to be made publicly. But any doubt which may have existed with respect to the 55 Geo. 3, c. 51, is removed by the 4 & 5 Will. 4, c. 48, s. 1, whereby, after reciting that "by divers statutes, justices of the peace assembled at their general or quarter sessions are authorised and empowered to make and assess the county rate;" and also reciting "that doubts have arisen whether, under the powers and directions of the said statutes, it is requisite that the business relating to the assessment, &c., of the county stock or rate, should be carried on and transacted by the said justices so assembled as aforesaid publicly and in open court at such general or quarter sessions, and a practice hath in some counties prevailed, of transacting such business in private, which hath been found inexpedient;" for the removal of such doubts, and preventing of such practice for the future, it is declared and enacted, that all business appertaining to the assessment, &c. of the county stock or rate, &c. "shall be done and transacted publicly and in open court at such general or quarter sessions." [*Parke, B.*—No reference is made to that statute in the 5 & 6 Will. 4, c. 76.] By the 5 & 6 Will. 4, c. 76, the borough council have only such power as the justices under the 55 Geo. 3, c. 51; and the latter have only a power to rate publicly.

Secondly, the rate is in part retrospective, for it was made to repay the arrears of the late town clerk's salary, and also to reimburse the attorney of the council the sums which he had paid in respect of damages and costs. *Woods v. Reed* (a) expressly decided, that under the 5 & 6 Will. 4, c. 76, s. 92, the council of a borough have no power to make a retrospective rate. Lord *Abinger, C. B.*, there says, "The general inconvenience of retrospective rates has been long known and recognised in the Courts of law, on the ground that the succeeding inhabitants cannot legitimately be

1850.
JOHNS
v.
JOHNSON.

(a) 2 M. & W. 777.

1850.
 JONES
 v.
 JOHNSON.

made to pay for services of which their predecessors have had the whole benefit. But here, independently of that general rule, the Act contains words which are in their nature prospective only." [Parke, B.—In Rogers's Eccles. Law, p. 1003, note, it is laid down, that it is no objection to a church rate that it is retrospective, and reference is made to *Chesterton v. Farlar (a)*.] In consequence of the decision in *Woods v. Reed*, the 1 Vict. c. 81, was passed; the 2nd section of which enables the council of any borough, within six months after the passing of that Act, to make and levy a borough rate, for the purpose of defraying any expenses previously incurred in putting in execution the provisions of the Municipal Corporation Act. [Parke, B.—Were the council bound to make a rate upon the chance of their being defeated and having the costs to pay? When is a rate to be made, if an action is pending, the result of which is so uncertain, that possibly the corporation may have to pay 1000*l*., or perhaps they may receive their full costs?] The expenses are incurred as soon as there is a judgment against the corporation. [Parke, B.—By the 5 & 6 Will. 4, c. 76, s. 92, the council is "authorised and required from time to time to estimate, as correctly as may be, what amount, in addition to the borough fund, will be sufficient for the payment of the expenses to be incurred in carrying into effect the provisions of that Act." Alderson, B.—On what principle are they to make the estimate? Take for instance the expenses of prosecuting felons at the Assizes; how can they possibly estimate what the probable expenses may be in the following year?] Here the expenses were not only incurred, but actually paid before the rate was made.

Thirdly, the 1 Vict. c. 81, authorises the overseers of every parish liable to the borough rate, to pay the amount "out of the poor rate made and collected, or to

(a) 7 A. & E. 713.

be made or collected for such parish." Here the council by their order directed the overseers to pay "out of the poor rates *made and collected*;" they then issue their warrant to the treasurer, who, by his precept, requires the overseers to pay the amount "out of the poor rates made and collected, *or to be made and collected*." The introduction of those latter words into the precept vitiates the proceedings.

Fourthly, the 55 Geo. 3, c. 51, s. 12, empowers the justices to order warrants to be issued to the constables, requiring them to issue their warrants to the overseers to collect the rates "within a time to be named and limited in the warrant." Here the treasurer by his precept requires payment to be made "within one hundred days next after the receipt of the precept;" whereas the warrant of the council commands him to demand payment within one hundred days from the date of the warrant to him. [*Parke, B.*—The treasurer extends the time of payment, so that there is no ground for complaint; if he had narrowed the time, it might have been urged that the money would have been paid if the full time had been allowed.] This course puts it in the power of the treasurer to favour any one parish.

Fifthly, it does not appear in the body of the warrant that the defendant Johnson was mayor of the borough at the time the warrant issued. Besides, the justices were *functi officio*, so soon as they had signed the warrant of distress, and consequently the alteration in the warrant rendered it void.

Sixthly, it does not appear on the face of the warrant, that the justices were acting within their jurisdiction. They merely describe themselves as "Justices of the said borough and city," and do not use the ordinary words "in and for" the city &c. In *Regina v. The Inhabitants of Stockton (a)*, it was held, that an order of removal, having

1850.
JONES
v.
JOHNSON.

(a) 7 Q. B. 520.

1850.
 JONES
 v.
 JOHNSON.

the marginal venue "Borough of K.," and commencing "upon the complaint of the churchwardens, &c., unto us G. and T., being two of her Majesty's justices of the peace for the said borough of K.," did not sufficiently shew that the justices heard the complaint within their jurisdiction. [*Parke, B.*—In *Hawkins' P. C.* vol. 2, bk. 2, c. 13, s. 23, it is said "that it is safe, but perhaps not necessary, in the body of the warrant to shew the place where it was made; yet it seems necessary to set forth the county in the margin at least, if it be not set forth in the body."]

Lastly, the warrant of distress is bad, for not complying with the requisitions of the 27 Geo. 3, c. 20. By the 1st section of that statute, justices granting warrants of distress are therein to order the goods distrained to be sold "within a certain time to be limited in such warrant, so as such time be not less than four days nor more than eight days," &c. This warrant does not limit any time within which the goods are to be sold. [*Platt, B.*—The word "then" points to the time. *Parke, B.*—The goods are to be sold immediately after the five days have expired.] In *Regina v. Williams (a)*, a warrant of distress, which directed the goods to be sold "forthwith," was held bad.

Keating (Whitmore with him) for the defendants.—First, the meeting of the town council, at which the rate was made, was a public meeting, duly convened according to the provisions of the 69th section of the 5 & 6 Will. 4, c. 76. It was not necessary that the doors should be thrown open to the public. [*Pollock, C. B.*—The council of a borough does not hold an open court.] The meaning of the 92nd section of that Act is, that the borough council, when properly convened, shall have the same powers as justices at sessions. [*Alderson, B.*—The 4 & 5 Will. 4, c. 48, was

(a) Q. B., Feb. 1, 1850.

passed in consequence of the discordant practice which had prevailed in various counties in making county rates. In some cases the meetings of the magistrates were private, in others they were public.] Justices are in the situation of assessors appointed by the Crown, while the borough council are a representative body; and therefore it is reasonable, that the public should be admitted in the one case, while they are excluded in the other. [*Alderson, B.*—The sitting in public is not a “power,” but rather a “restriction.”] He referred to *Rex v. The Justices of Nottingham* (a).

Secondly, the rate is not bad on the ground of its being retrospective. *Woods v. Reed* does not touch the present case, for it related to a different description of expenses, and concerning which a strictly prospective rate might have been made. Here there are some expenses which cannot be provided for prospectively, as, for instance, law expenses, of which it is impossible to make a correct estimate beforehand. Or suppose a dismissed officer claims 500*l.* a year, while the council consider him entitled to nothing, how can they make an estimate of what he may possibly recover? This rate is as prospective as it could be under the circumstances. In *Regina v. Reed* (b), it was held, that although rates are not to be made retrospectively, yet when overseers, by reason of a balance in hand of an old rate, or the getting in of an uncollected rate on which a particular debt is chargeable, are enabled to defer the making of a new rate, such debt may be properly paid out of the new rate, and that this applies peculiarly to the expenses of litigation. It would be a matter of great and almost insurmountable difficulty to make a rate with extreme strictness. If, for instance, too large a sum for future expenses were to be estimated by the council, it would be a hardship to the existing rate-payers; or

1850.
JONES
v.
JOHNSON.

(a) 3 A. & E. 500.

(b) Q. B., May 4, 1849.

1850.
 JONES
 v.
 JOHNSON.

if, on the other hand, the sum were too small, there would be a difficulty in obtaining the balance, for it would then be said that the rate was retrospective. If, therefore, the council make their estimate fairly and reasonably, any rate subsequently assessed to provide for the deficiency ought not to be considered as a retrospective rate. This is in accordance with the view taken by the Master of the Rolls in *The Attorney-General v. The Corporation of Lichfield*(a), where the present rate was under his Lordship's consideration. He there says, "I think that, upon the true construction of the Municipal Corporation Act, it is the duty of corporations to provide, as far as they can, within the year, for the expenses of the year, by securing, by means of a rate, if their other means are insufficient, such an income as, upon a proper estimate, may be found necessary; and that they ought not to contract debts to be paid in future years for the purpose of avoiding in the current year to provide for expenses then incurred." And he afterwards proceeds to say, "But on the other hand, I do not think it clear that this Act of Parliament ought to be so strictly construed as to lead to the conclusion that an expense, not included in a prior estimate, and so incurred as to constitute what may be justly called a debt, before a subsequent estimate or rate is made, can in no case whatever be lawfully provided for by such subsequent estimate or rate." But assuming the rate to be retrospective, the action of replevin is not the proper form of remedy. The defendants did no more than issue the warrant. It was not their duty to ascertain whether the rate was retrospective or not. The plaintiff ought to have appealed to the quarter sessions: *Marshall v. Pitman*(b). If the rate is not wholly bad, the plaintiff cannot raise the question in the present form of proceeding. For, according to his argument, if the estimate were incorrect in the small-

(a) 17 L. J., Chanc., 472.

(b) 9 Bing. 595.

est particular, the whole rate would be bad. The recent case of *George v. Chambers* (a), no doubt, decided that replevin will lie against the party who takes the goods and has the custody of them; but it is not an authority that the action will lie against the magistrates, who have neither taken the goods nor have the custody of them. The authorities are collected upon this subject in Dodd's edition of Bac. Abr. "Replevin," (C). [*Parke, B.*—Surely replevin lies in all cases against a party by whose order goods have been improperly taken. We considered that matter well in the case of *George v. Chambers*. I do not think that such an objection is likely to prevail.]

Thirdly, the introduction of the words "to be made and collected" into the precept does not vitiate the proceedings. Those words do not necessarily refer to the date of the warrant, but may be understood as meaning any rate that might be afterwards made and collected. The plaintiff has not been damnified by it.

Fourthly, it is no objection that the time of the payment has been extended from a period of one hundred days from the date of the warrant, to that of one hundred days from the date of the precept; for it is a benefit to the party who is required to make the payment. [*Alderson, B.*—The Act means, that the time allowed is not to be less than one hundred days.]

Fifthly, it sufficiently appears upon the face of the warrant that the defendant Johnson was mayor of the city of Lichfield at the time the warrant was issued; for both his signature appears upon it, and the corporate seal is affixed to it. The re-signature of the warrant before it was issued is immaterial. [*Per Curiam.*—There is nothing in that objection.]

Sixthly, it also appears that the warrant was issued within the jurisdiction of the justices. In *Reg. v. Stock-*

1850.
JONES
v.
JOHNSON.

(a) 11 M. & W. 149.

1850.
 JONES
 v.
 JOHNSON.

ton (a), the complaint of the overseers was not set out, and therefore it did not appear to have been made within the jurisdiction. Here, although there are not the words "in and for," which the plaintiff contends should have been present, yet the words "Borough and city of Lichfield" appear in the margin. The warrant is also signed by the justices, and has the corporate seal affixed to it. The fair presumption therefore is, that the order was made within the jurisdiction.

Lastly, the warrant is sufficient, although it does not fix a limit within which the sale of the goods is to terminate. It is in conformity with the precedents. It is in effect a direction to the officer to sell at the expiration of the fifth day.

Gray replied, and cited *Pallister v. Mayor of Gravesend* (b), *Tawny's case* (c), *Lanchester v. Tricker* (d), and *Rex v. Sillivant* (e).

POLLOCK, C.B.—I am of opinion that the defendants are entitled to judgment. The cases cited by the plaintiff's counsel are apparently authorities that rates must not be retrospective; but the case of *Woods v. Reed* merely decided that a borough rate, which upon the face of it was retrospective, could not be sustained. In my opinion it never could have been intended that so many difficulties should be thrown in the way of making a rate. We ought therefore to give such effect to the words of the statute as will best meet the exigencies of the case. The legislature has provided that the borough council is to make an estimate, if that can be done, for the purpose of providing prospectively for those expenses. It may, however, happen that this may not be possible, although made with all

(a) 7 Q. B. 520.

(b) 19 L. J., C. P., 358.

(c) 2 Salk. 531.

(d) 1 Bing. 201.

(e) 4 A. & E. 354.

Due care and fairness. It may be that the prospective estimate will fall short of the demand upon it, or persons may fail to pay their rates, or the rate may become unproductive from some other cause. It is impossible for the council to guard against all such matters. It therefore appears to me that under such circumstances, if a rate is made prospectively, and it turns out to be inadequate to the occasion, and another rate is requisite, it is competent to the council to make it. But the question here is, whether this rate is prospective or retrospective; and I am of opinion that in point of fact it is prospective, for it was made *bonâ fide* and for the purpose of providing for payments which it was expected would become payable thereafter. I therefore think that the rate was not retrospective; but I doubt whether it would have been bad if we had held it to be retrospective. The object of the statute was to enable the council to pay their debts, and we ought to construe the clause applicable to this point as directory only, in all cases where the council act *bonâ fide*. With regard to the objection that the rate ought to be made in public, it is a sufficient answer that the Municipal Corporation Act has given generally to town councils as nearly as possible the same power on this subject as to county justices assembled in quarter sessions. And what strengthens my opinion that the meeting of the council need not be a public one is, that the Municipal Corporation Act does not refer to the 4 & 5 Will. 4, c. 48, which directs justices to make county rates in open court. The 92nd section of the Municipal Act is the section that applies to the present case. But the council is not a court, whereas the quarter sessions are a court, and the meetings of the council take place in private. It is, therefore no objection to the validity of this rate that it was not made in public. As to the objection relating to the hundred days mentioned in the order and precept, I think the defendants' counsel has given a sufficient answer to it.

1850.

JONES
v.
JOHNSON.

1850.
JONES
v.
JOHNSON.

With respect to the other points, I think the meaning of the order of the council is, that the money is to be raised out of the rates made and collected or to be made and collected. I also think there is no force in the objection to the warrant, that it does not contain a distinct statement of the jurisdiction in the body, as the venue sufficiently appears in the margin. Then as to the objection, that it does not appear that the defendant Johnson acted as mayor, his signature may be taken into account, in the same way as the date of a letter may be looked at to see at what time or place it was written. The last objection is of no weight; and therefore, as all the objections which the plaintiff has raised altogether fail, the defendants are entitled to our judgment.

PARKER, B.—I am of the same opinion. As to the first objection, that the rate was void, inasmuch as the council ought to have sat openly and in public upon the occasion when they made the rate, that objection is founded partly on the avowry, and partly on the language of the Act of Parliament. Now the avowry states, that the council "publicly rated, taxed, and assessed the parishes, &c., constituting the borough;" and so far as the rate is stated to have been made in public, the avowry is not supported by the evidence. But that statement is mere surplusage, unless the council is bound to sit for the transaction of business with open doors. The Municipal Corporation Act directs the borough council to make a borough rate in the nature of a county rate. The 4 & 5 Will. 4, c. 48, applies only to the proceedings of county justices, whose practice in making county rates varied in different districts, it being usual in some counties to make them publicly, in others privately. The town council of a borough is not, however, a court, and is not bound to sit with open doors; and if the legislature had intended that that should be the practice, they would not have omitted in the Municipal Corporation Act

all reference to the 4 & 5 Will. 4, c. 48, which directs that county justices at quarter sessions shall so sit when making rates for the county. It is therefore no objection to this rate that it was not made in public. The next question is, whether this rate is bad as being retrospective, on the ground that the estimate of the council included by-gone expenses; and the principal objection is, that the solicitor of the corporation paid a certain sum of money for costs, to save the corporation from an execution, which sum was to be included in the bill that he had not then delivered. I think this circumstance does not affect the question as against the defendants; for they issue their warrant in respect of a rate which, upon the face of it, is perfectly good. The council have estimated the money which is to be repaid to the solicitor; and although the rate be in fact made in part for by-gone expenses, it is not a bad rate as regards the defendants, unless it be clear on the face of it that it was meant to include by-gone expenses. In *Chesterton v. Farlar*, which has been referred to, in a suit for the nonpayment of a church rate, a prohibition was moved for to the Privy Council, to which an appeal had been made, on the ground that the rate appeared to be retrospective and bad from what appeared upon the pleadings. This Court refused a prohibition, the cause being before a Court the jurisdiction of which was not denied, no erroneous proceeding having taken place there, and the Court refusing to presume that the Judicial Committee would act incorrectly. *Rex v. Sillifant* seems to shew that where a rate was regular on the face of it, but appeared to have been made to meet past disbursements, it was not therefore bad, whatever objection might be raised to a retrospective application of the money in passing the churchwardens' accounts. Therefore, in the present case, if the town council were wrong in making a retrospective rate, no advantage can be taken of that fact in an action against the defendants in this case, being the

1850.
 JONES
 v.
 JOHNSON.

1850.
JONES
v.
JOHNSON.

magistrates who enforce the rate by distress. I by no means say that the town council were wrong in the course they took. They thought they were right, and there was nothing fraudulent in their conduct. Some latitude must be allowed them under the circumstances; for they cannot ascertain in all cases with exactness the amount of money that will be wanted, but are bound to raise, as nearly as possible, the sum that will be required. I, therefore, do not say that this order of the council was not warranted. In *Woods v. Reed*, the only point decided was that, under the Municipal Corporation Act, the borough council had no power to make a retrospective rate. But there the expenses were clearly by-gone; here it is doubtful whether they are so. Again, supposing the expenses to be by-gone, and the rate to be good upon the face of it, the time for making the objection is when the accounts are allowed. The next objection is, that the precept does not follow the order of council, which is a departure from the Act, which authorises the council to require payment of the borough rate out of the "poor rates made and collected, or to be made and collected," whereas the order is for payment out of the "poor rates made and collected" only. Now it appears that by that statute, 55 Geo. 3, c. 51, the overseers are empowered to make a rate in order to raise the sum assessed on the parish, or to reimburse themselves by a rate, so that the money may either be ordered to be paid out of a rate already made, or a special rate may be made for the purpose. But it is said that there is a variance between the precept and the order of council; the latter limiting the payment required to be made out of the rates already "made and collected." Now the words of the statute are not to be construed with extreme strictness. The Act of Parliament directs the payments to be made out of a rate "made or to be made." All that is meant is that the payments are to be made out of the poor rates; and the words in the order of coun-

1850.
 JONES
 v.
 JOHNSON.

cil, "made and collected," may be taken substantially to mean such rates as shall be made and collected at the time of payment. The next objection is, that the precept was not warranted by the order of council, which directs the overseers to pay their proportions within one hundred days after service upon them of the order, whereas the precept requires the overseers to pay the amount within one hundred days after demand. But the precept does not limit the time for payment given by the order under the 55 Geo. 3, c. 51, but on the contrary extends it. The overseers, therefore, have had the whole of the one hundred days from the time of the service of the demand upon them, to pay the rate. The next objection is, that the warrant does not support the avowry, which alleges that the defendant Johnson in granting it acted as mayor. This is a purely technical objection, and cannot prevail. There is no authority for saying that the signature may not be looked at and considered as part of the warrant. It is then said that the warrant is invalid, by reason of its being altered after it was issued, but this is not the case. The date was altered whilst it was in the possession of the justices, before it was issued, and they were clearly at liberty to alter it at that time. The next objection is, that the warrant is defective on the face of it, for not shewing that the justices were acting within their jurisdiction at the time it was issued by them; and *Reg v. Stockton* was cited. But it does appear to have been issued within the jurisdiction, for we may take the venue in the margin as constituting the place of making the warrant; and, in addition to that, the passage in 2 Hawk. P. C. bk. 2, c. 13, s. 23, which was cited by me during the argument, is conclusive. The next objection arises on the 27 Geo. 2, c. 20. It is said that the warrant of distress does not fix the limit of the sale, and that there ought to be some limit fixed. Now the statute 27 Geo. 2, c. 20, enacts, that the time for selling the goods shall "be limited in such warrant, so as the time shall not be less than four days nor

1880.

JONES
v.
JOHNSON.

more than eight." The obvious meaning of that section is, to fix the time within which the party distrained on may save his goods by tendering the amount due with the costs. Here the warrant does specify five days as the time allowed for payment, and then the officer is directed to effect the sale. The warrant, it is true, does not say when the sale is to be completed, but that is not necessary. This warrant pursues the ordinary course of the precedents. If, indeed, the warrant had directed the sale to take place *forthwith*, it would be bad, as it would not then give the party distrained upon sufficient time to turn about him and to procure the means of payment. This was determined by the case of *Reg. v. Williams*, which has been referred to. On the whole, I am clearly of opinion that the warrant was good. The objections, therefore, are all answered, and the defendants are entitled to judgment.

ALDERSON, B. and PLATT, B. concurred.

Judgment for the defendants.

Nov. 21.

O'CONNOR v. BRADSHAW.

A Company, consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers.

CASE for libel.—The declaration recited, that the plaintiff was a member of Parliament, and that there had been established a Company called "The National Land Company," to which there were 5000 subscribers of a fund of 100,000*l.*, and of which Company the plaintiff was a director. The declaration then set out the libel, which stated, amongst other things, that the plaintiff had wheedled the people of England out of 100,000*l.*, with which

The allotment depended upon the result of a ballot. In connexion with this Company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the Company; and as part of the same concern, a bank in which the subscribers of the Company might place their savings for purchasing their land from the Company:—*Held*, that the scheme was illegal, as being contrary to the Bank Act. *Quære*, whether it was illegal as being contrary to the Lottery Act, or whether it fell within the 11th section of the 12 Geo. 2, c. 28.

he had bought estates, and conveyed them to his own use and benefit; and that his excessive honesty in connection with the land plan had been and would continue to be exposed in the Nottingham Journal.

1850.
O'CONNOR
v.
BRADSHAW.

The defendant pleaded, first, Not guilty; upon which issue was joined: and secondly, a plea which in substance stated, that the National Land Society was a joint-stock Company, established for a purpose of profit; that such Company was a partnership consisting of more than twenty-five members, formed after the 1st of November, 1844, with the professed object of purchasing and erecting houses, and of allotting them to members, upon such terms as to enable them to become small freeholders and live independently; that the Company was provisionally registered; and that the plaintiff was a promoter, member, and provisional director of it; and that he published rules intending to induce poor persons to become members of the Company, and to advance their money for shares, and to deposit it in a certain bank; that the introduction of these rules was not true, which the plaintiff knew; that at the time of the publication of these rules, the Company had the banking department attached to it, to create the belief that deposits made with the bank were deposits made with the security of the Company's property; and that, at that time, the plaintiff well knew that it was doubtful whether depositors could have security for repayment of their deposits from the property of the Company; and that after the Company was formed, and before it was completely registered, the plaintiff received from 40,000 members more than 10s. for every 100l. which they were induced to pay by the publication of the rules; and that at that time the rules provided, that no member should hold less than two or more than four shares; that the shares were only 1l. 6s. each; that the plaintiff held out in the books, that members were to have allotted to

1850.
 O'CONNOR
 v.
 BRADSHAW.

them a house and four acres of land, with a reasonable sum with which to commence agricultural operations; that it could not be expected that the value of such allotment could be less than twenty times the amount of a share; that, at that time, there was no reasonable prospect of the Company being able to provide allotments for more than one-twentieth part of its members; and that it was reasonably necessary that 20,000 poor persons, who had become shareholders, would lose their money; that the plaintiff was dishonest, in falsely suggesting the existence of a banking department of the Company, and also in holding out expectations of allotments, which could not be fulfilled; that the plaintiff, at the time of the libel, was proprietor of the Northern Star newspaper, and that he was in the habit of publishing therein accounts of the objects and prospects of the Company; that one of the objects of it was the wilfully risking the property of others to increase the sale of that newspaper; and that the plaintiff, with the capital stock, purchased lands not necessary for constituting the Company, and wrongfully caused the inheritance in fee to be conveyed to him and his heirs absolutely for his own benefit, and not in trust; that he did not within a reasonable time declare that he held the lands in trust for the Company; and that he laid out 20,000*l.* capital stock of the Company in erections upon lands; and that he risked the safety of the capital stock of the Company. Replication, *de injuriâ*, and issue thereon.

At the trial before *Pollock*, C. B., at the Middlesex Sittings after Hilary Term, 1849, the following facts appeared:—The plaintiff was member of Parliament for Nottingham, and the projector of a Company called “The National Land Company.” The Company appeared to have been established in 1845, but had changed its title several times, and in 1849 had adopted that already mentioned. Several books containing the rules of the society

had been published at various times (a). The objects of the society were to purchase land, erect dwellings thereon,

1850.
O'CONNOR
v.
BRADSHAW.

(a) The following is an extract from the 4th set of Rules, which were published by the Company, and in which the object of the Company was described as follows:—

“The object of the Company is,—To purchase land in various parts of the United Kingdom; and to erect on such land dwellings, to be allotted to members of the Company, with two, three, or four acres of land for agricultural purposes, according as the allottees hold two, three, or four shares respectively; also to raise a fund, out of which sums of money in proportion to such shares shall be advanced to or applied for the benefit of allottees on taking possession of their allotments, and to create a continually progressing fund for the purposes aforesaid, by advantageous investment of monies of the Company, and by selling, mortgaging, or otherwise disposing of the estates themselves, at their increased value, from time to time, for the benefit of the Company.”

The following is also an extract, from the same book of Rules, of some of the rules of that society:

“CAPITAL.

“1. That the capital of the Company be 130,000*l.*, divided into 100,000 shares of 1*l.* 6*s.* each; which capital may be increased by the issue of new shares of like value, to the amount of 65,000*l.*

“2. That the directors shall not allot to one person less than two or more than four shares.

“3. That the directors may, with consent of an ordinary general meeting of members, from time to time, retain such sum or sums as they shall think fit, not exceeding 100*l.* per annum, for a reserve fund not exceeding 1000*l.*, for the benefit of the Company, either generally for extraordinary expenses or otherwise, or for any specific purpose, and to invest the same on Government or real securities.”

“FUNDS OF THE COMPANY.

“42. That the treasurer shall deposit all monies, when the same amount to 250*l.* or upwards, and not applicable to immediate purposes, in the bank of the Company, in the joint names of himself and the trustees for the time being.

“43. That no money shall be drawn out except upon the written authority of a majority of directors, and by the draft or order of the treasurer and one trustee, countersigned by the secretary.

“44. That all payments, to the amount of 100*l.* or upwards, shall be made by draft or order.

“45. That all surplus monies exceeding 1000*l.* shall, from time to time, be invested upon Exchequer bills or other Government or real securities, until required for the use of the Company.”

1850.
 O'CONNOR
 v.
 BRADSHAW.

and allot them to its members on such terms as should enable them to become small freeholders, and live in comfort and independence; which objects were to be effected in the following way:—A large sum of money was to be raised by shares of 1*l.* 6*s.* each, and was to be laid out in the purchase of land and the erection of houses. The subscriber of two shares, or 2*l.* 12*s.*, became entitled to a house, two acres of land, and an advance of 15*l.* The subscriber of three shares to a house, three acres of land, and 22*l.* 10*s.* Their right, however, to obtain these privileges was not absolute, but depended on the result of the ballot, according to which a small number only of the subscribers could obtain present possession of houses, land, and money; so that in five years, during which the plan was in operation, out of 70,000 shareholders, 227 only had obtained allotments.

The mode in which the allottees of land were to be located was thus described in the first set of rules:—Good arable land may be rented in some of the most fertile parts of the country at the rate of 15*s.* per acre, and might be bought at twenty-five years purchase, that is, at 18*l.* 15*s.* per acre; and supposing 5000*l.* raised in shares of 2*l.* 10*s.* each, this sum would purchase 120 acres, and locate sixty persons with two acres each, besides leaving a balance of 2750*l.*, which would give to each of the occupants 46*l.* 16*s.* 8*d.*, 30*l.* of which would be sufficient to build a commodious and comfortable cottage on each allotment,

Upon the cover of the book was the following:—

“National Land and Labour Bank, established in connexion with the National Land Company.

“The Deposit Department is open to all who wish to invest their funds therein, secured upon the property of ‘The National

Land Company,’ at an interest of — per cent.

“The Redemption Department is open to members of ‘The National Land Company’ only. The monies deposited by each member to be applied to the redemption of his allotment, &c. Such monies to bear interest at the rate of four and a half per cent. per annum.

one-half of the remaining 15*l.* 16*s.* 8*d.* would be sufficient to purchase implements, stock, &c., leaving the residue as a means of subsistence for the occupant, until his allotment produced the necessaries of life. These allotments with dwellings might be leased for ever to the members of the society, at an annual rental of 5*l.* each, which would be far below their real value. The gross annual rental would thus amount to 300*l.* This property, if sold at twenty years purchase (which would be below the market value), would yield to the funds of the society 6000*l.*; which sum, if expended in a similar manner to the first, would locate other seventy-two persons. These seventy-two allotments, sold at the rate of the first, would bring 7200*l.*; and this sum, laid out in the purchase of other land, building of cottages, &c., at the original cost, would locate 86 2-5ths persons. These 86 2-5ths allotments, if sold, would realise 8634*l.* 8*s.*, and with this amount of capital the society would locate other 103 1-6th persons. These 103 1-6th allotments would produce 16,317*l.* 3*s.* 4*d.*; and the last-named sum, expended as before, would locate 123 1-3rd persons. Thus the original sum of 5000*l.* would more than double itself at the fourth sale, and so on in the same ratio. The benefits arising from the expenditure of the funds in the manner above stated, may be seen at a glance in the following summary:—

	£	s.	d.	Purchase	Locate
Original Capital . .	5,000	0	0	120 Acres	60 Persons
First Sale produce . .	6,000	0	0	144 "	72 "
Second ditto . .	7,200	0	0	172 "	86 "
Third ditto . .	8,634	8	0	206 "	108 "
Fourth ditto . .	10,317	8	4	246 "	123 "

continuing to increase in the same proportion until the tenth sale, which would realise 37,324*l.*, and locate 572 1-2

1850.
 O'CONNOR
 v.
 BRADSHAW.

persons. Thus the total number which could be located in ten sales, (which, if the project be taken up with spirit, might easily be effected in four years,) would be 1923 persons, in addition to having in possession of the society an estate worth at least, in the wholesale market, 37,324*l.*; which estate could be resold, increasing at each sale in value and capability of sustaining the members until, in the space of a few years, a vast number of the surplus labour population could be placed in happiness and prosperity upon the soil of their native land, and thus become valuable consumers as well as producers of wealth."

In connection with the National Land Company, the plaintiff also established a bank, "The National Land and Labour Bank." The purposes of this bank were twofold: it was to be, first, a bank of deposit, in which small capitalists, working men, and benefit societies might deposit their funds upon the security of the Company's property; secondly, a bank of redemption, in which the shareholders might place their savings, for the purpose of purchasing their land, &c. from the Company.

The Lord Chief Baron, in his direction to the jury, told them that, in his opinion, the whole of the plaintiff's scheme was illegal, on the ground of its being contrary to the Bank Act and to the Lottery Acts. A verdict was found for the defendant upon the second plea; but in returning the verdict the jury accompanied it with the expression, that it was their unanimous opinion that the plaintiff's character stood unimpeached as regarded his personal honesty.

Wilkins, Serjt., obtained a rule nisi for a new trial, on the ground of misdirection, and of the verdict being against the evidence: one imputed ground of misdirection being that part of the direction which related to the illegality of the scheme. This was stated by the learned counsel in

support of the rule not to be the principal ground upon which he rested his case; but as the other grounds do not involve any matter of law, they are not reported.

1850.
O'CONNOR
v.
BRADSHAW.

In the present Term (November 19)

Roebuck, Keating, and Bagley shewed cause.—The plaintiff's scheme was not justified in law, but was illegal; and therefore the direction of the Lord Chief Baron was correct. In the first place, it did not comply with the provisions of the 7 & 8 Vict. c. 113, "An Act to regulate Joint Stock Banks in England." No alteration was made in its rules. The association was also held out to the world as a Banking Company. It was, therefore, illegal, as contrary to the Bank of England Charter Act, 7 & 8 Vict. c. 32. The scheme was also illegal as a lottery, for lotteries are prohibited both by the common law of the land and by the express language of the several statutes which have been passed as declaratory of the common law, and for the better suppression of what has been considered to produce a spirit of speculation, and an amount of risk, which is highly injurious to those who may be led to join in such schemes. This is clearly a lottery. But a few of the subscribers out of a vast number obtain prizes by lot. It would be impossible for *all* to obtain a return for their subscriptions. *Cresswell, J.*, in *Allport v. Nutt* (a), says, "The mischief intended to be remedied is the introduction of a spirit of speculation and gambling, tending to the ruin and impoverishment of families, and not, as you suggest, the gain acquired by the individual. Suppose a horse were sold by tickets amounting in the aggregate to the true value, would not that be a lottery?" And *Tindal, C. J.*, in delivering the judgment of the Court says, "The 10 & 11 Will. 3, c. 17, recites the mischiefs from certain lot-

(a) 1 C. B. 984.

1850.
 O'CONNOR
 v.
 BRADSHAW.

teries under colour of certain patents and grants; and then enacts, not only that all such lotteries, but also that *all other lotteries*, are nuisances, and imposes a penalty on all persons who shall draw at any lottery. The 42 Geo. 3, c. 119, recites the mischiefs from certain lotteries called 'little goes,' and enacts, that any person who shall keep any place to keep open any lottery called a little go, or *any other lottery whatsoever not authorised by Act of Parliament*, shall forfeit 500*l*." The legislature appear to have had such a scheme as the present in their contemplation at the time of the passing of the 12 Geo. 2, c. 28, which, after reciting various statutes upon the subject of lotteries, enacts in substance in the 1st section, that all persons who shall erect or keep any office or place, under the denomination of sales of houses, lands, &c., for the improvement of small sums of money, or shall sell or expose to sale any houses, lands, &c., by way of lottery, or by lots, tickets, numbers, or figures, or shall make, print, advertise, or publish proposals or schemes for advancing small sums of money by several persons, amounting in the whole to large sums, to be divided among them by the chances of the prizes in some public lottery allowed by Act of Parliament, shall be liable to a certain penalty. This scheme seems to fall within the very language of that Act. [*Parke, B.*—But then the 11th section of that Act presents an obstacle to that argument, and gives a colour to the argument of the plaintiff. That section provides, that "nothing herein contained shall extend, or be any ways construed, deemed, or taken to extend, or in any sort to affect or prejudice any estate or interest in, out of, or to any manors, honours, royalties, lands, tenements, advowsons, presentations, rents, services, and hereditaments whatsoever, which shall or may at any time or times hereafter be, according to the laws now in being, legally allotted to or held by or by means of any allotment or partition by lots; but that

1850.

O'CONNOR
v.
BRADSHAW.

all persons who now are, or that shall hereafter become really and truly seised, as part owners, joint-tenants, and tenants in common, of any manors, honours, royalties, lands, tenements, advowsons, presentations, rents, services, and hereditaments, shall, and he, she, and they, and his, her, and their heirs and assigns, is and are hereby made and continued capable to accept and take such estates and interests and parts therein, in such and the like manner, and to such and the like uses, as he, she, or they might, would, or could have done by or by virtue or in consequence of any lot, scroll, chance, or allotment whatsoever, had this present Act never been made." The question is whether the present case does not fall within that proviso.] That section applies to joint-tenants and tenants in common, where each of the lots represents the exact value of each person's interest in the land. Each person has a certain portion assigned to him; but under the scheme in question, a few persons only out of a vast number obtain any proportionate return. [*Pollock*, C. B.—I think it questionable whether the land can be purchased with the object of dividing it under that section. *Parke*, B.—Suppose a number of persons were to buy a large collection of pictures, some of which far exceeded others in value, might not it be decided by lot who should have the first choice?] If, by the first choice, the party might select the most valuable picture, it is submitted that the transaction would be a lottery, and therefore illegal, unless sanctioned by Act of Parliament: *Gatty v. Field* (a). The following statutes shew the light in which lotteries have been frequently viewed by the legislature: 10 Ann. c. 26; 9 Geo. 1, c. 19; and 22 Geo. 3, c. 47.

Wilkins, Serjt., *Atherton*, and *Prentice*, in support of

(a) 9 Q. B. 431.

1850.
 O'CONNOR
 v.
 BRADSHAW.

the rule.—It can hardly be contended that all transactions which are popularly called lotteries are illegal. It cannot be said that the mere fact, that a party obtains priority of choice by lot, is contrary to common law. The various statutes which have been passed upon the subject of lotteries, and by some of which severe penalties are inflicted upon offenders against them, afford a good argument that the offence is the creature of the statute law. The offence, if substantiated, is liable to heavy penalties, and ought to be strictly proved. These statutes are not only penal, but their object is to punish an offence of a degrading character. This scheme was perfectly fair, and the system of distribution by lot was adopted as the most advantageous mode of determining the priority. The Art Union Acts, 7 & 8 Vict. c. 109, and 9 & 10 Vict. c. 48, have recognised a system of distribution like the present as legal. This was merely a particular mode of dealing with the partnership fund, as in the case of *Silver v. Barnes* (a). The case moreover falls within the 12 Geo. 2, c. 28, s. 11.—They referred to Bac. Abr. "Coparceners" (C).

Cur. adv. vult.

PARKE, B., now said—I think that this rule ought to be discharged. It was granted on the ground of misdirection; and the principal misdirection which induced me to concur in granting the rule, was a statement that my Lord Chief Baron had told the jury that this scheme was illegal within the Lottery Acts. It was suggested that that was not the main ground of the application, it not being clear that the matter had not been left at large. All the objections to the summing up were argued before us on shewing cause; and I think those objections, as they are presented to us, are not supported. The first question

(a) 8 Sc. 300.

is, whether my Lord was right in telling the jury that this was a lottery within the meaning of the Lottery Acts, particularly the 12 Geo. 2, c. 28. Now if the question were to turn upon this, whether it was or was not illegal within the meaning of that Act, I should like to take further time for consideration; because, after giving it every consideration in my power, I cannot bring myself to the opinion that this is a scheme illegal within the Lottery Acts. Although I do not mean at present to say I differ from my Lord Chief Baron on that point, I am not perfectly satisfied to agree with him; and if this was the main part of the statement, and essential to the justice of the case, and if, in order to support the view taken by my Lord Chief Baron, it was necessary to shew that this scheme was illegal within the Lottery Acts, I think there ought to be a new trial. But it is perfectly clear, from the statement of the mode in which that part of the case was presented to the jury, that my Lord told the jury that the whole scheme was illegal, that being a portion of the case in order to shew that the effect of the scheme was to delude the public, stating that illegality as one of the circumstances. He mentioned that it was illegal on two grounds: first, as being contrary to the Bank Act; and secondly, as being contrary to the Lottery Acts. The latter was only one instance of illegality; and it is perfectly clear that the scheme was illegal, as being a violation of the Bank Act; and if illegal in one respect, the mention of the other also seems to me not to affect the summing up, or to satisfy us that justice has not been done. It being clearly illegal in one respect, I think it immaterial to consider, in this action, whether it was illegal in other respects. What the result may be in another proceeding is a different question. I think, therefore, my Lord's summing up in this respect cannot be the ground of a new trial.—(The learned Judge then adverted to the other points in the

1850.
 O'CONNOR
 v.
 BRADSHAW.

1850.
O'CONNOR
v.
BRADSHAW.

case, and said, that in his opinion the rule ought to be discharged).

ALDERSON, B., and PLATT, B., concurred.

POLLOCK, C. B., stated that he was not dissatisfied with the verdict.

Rule discharged.

Nov. 5.

DOE d. CHILDE and Others, Trustees of THE LUDLOW CHARITIES, v. WILLIS.

By the provisions of a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, duly confirmed by the Lord Chancellor, it was declared that the trustees should have authority, upon such grounds as they should, at their discretion,

EJECTMENT to recover the possession of certain houses and premises occupied by the defendant, as head master of the Ludlow Grammar School of King Edward VI.

At the trial, at the Shropshire Summer Assizes, before *Williams, J.*, it appeared that the lessors of the plaintiff claimed as trustees of the Ludlow Municipal Charities. The school in question was founded by charter of Edward VI., dated the 26th of April, 1552; the powers of appointment and amotion being thereby given to the old corporation of Ludlow. These powers, and generally the power to make orders for the administration of the charity, were, by

in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed:—*Held*, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed; and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal.

By an order, the Lord Chancellor, in whom the power of appointing new trustees was vested, referred it to the Master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead, or who had left the borough of L.; and after his report, such further order was to be made as was just. The Master reported that he had approved of eight persons as fit and proper to be appointed &c. This report was confirmed; and, in the confirmation, the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private Act, the property of the trust was vested in the trustees for the time being, without any deed of transfer:—*Held*, that this was a valid appointment of the eight new trustees by the Lord Chancellor.

the 5 & 6 Will. 4, c. 76, s. 70, transferred to the Lord Chancellor. In pursuance of this authority it was, by order of the Lord Chancellor, dated the 26th day of August, 1836, referred to Master *Brougham* to appoint new trustees for the said charity. By his report, dated the 16th of February, 1837, he appointed seventeen persons to be such trustees (nine of whom were lessors of the plaintiff); and this order was confirmed by the Lord Chancellor on the 3rd of December, 1837.

On the 25th of July, 1838, the defendant was duly appointed head master of the school, and entered upon his duties. An information was for many years pending as to the administration of the charities; and to settle these disputes, on the 27th of July, 1846, an Act was passed, 9 & 10 Vict. c. xviii (a), by which the trustees were to hold the property upon the uses and trusts to be declared by a scheme to be settled by the Master. This scheme was duly settled and confirmed on the 2nd of August, 1848. The 14th rule was as follows:—"That the said trustees shall have authority, from time to time, upon such grounds as they shall at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, or

1850.

DOE
d.
CHILDE
v.
WILLIS.

(a) By the 25th section of that Act it is enacted, "That in the construction of this Act the word 'trustees' shall, when used with reference to the said charity property, be deemed and taken to mean and comprise the persons who from time to time shall be the trustees of the said charity; and that when and so often as any person or persons shall have been duly appointed trustee or trustees of the charity property, real or personal, then and in every such case, by virtue of such appointment

alone, and without any deed or instrument, conveyance, surrender, or assignment whatsoever for that purpose, all the property, real or personal, belonging to the said charity, shall forthwith be and be deemed to be vested in such new trustee or trustees as aforesaid, either alone or jointly with the surviving, continuing, or other trustee or trustees of any of the same property, upon and for the trusts and purposes of the said charity."

1850.

DOR
d.
CHILDS
v.
WILLIS.

any additional master or masters, or either of them, from their or his offices or office, in the manner hereinafter mentioned; that is to say, that on the requisition in writing, signed by three of the trustees at least, the secretary of the said trustees shall call a meeting of the said trustees, a notice in writing being given or sent to each of the said trustees six days before the holding of such meeting, and in such notice it shall be stated that at the said meeting it is intended to propose the removal from the said office of master, usher, or additional master or masters, of the person whose name shall be in the said notice; and that at the same meeting there shall be present not less than two-thirds of the trustees for the time being; and that at the said meeting a resolution shall be proposed by one and seconded by another of the trustees, for the removal of such master, usher, or additional master or masters; and that if the same be carried by at least two-thirds of the trustees so present, the same shall be entered on the minutes of the said trustees, and signed by such of them as vote for the said resolution; and that, if the said resolution shall at a subsequent meeting of the said trustees, called by such notice as last hereinafter mentioned, and in which notice shall be set forth the former resolution, and at an interval of one calendar month at least, whereat the same proportion of trustees at least shall be present as is required to be present at the first meeting, be confirmed by two-thirds of the said trustees then present, the said master, usher, or additional master or masters shall be considered as removed as on the day of the said second meeting, and his office shall be vacant on and from that day: Provided that such resolution and the confirmation of it as aforesaid, together with the grounds of such removal, shall be entered and preserved upon the minutes of the proceedings of the said trustees."

On the 20th of May, 1848, an order was made by the Lord Chancellor, referring it to Master *Brougham* to approve of

eight fit and proper persons *to be appointed* trustees of the said charities in the place of those dead and having quitted the borough of Ludlow; and after his report, such further order was to be made as was just. On the 28th of February, 1849, the Master made his report, and after reciting (*inter alia*) that eight persons (naming them) had been proposed as fit and proper persons to supply the vacancies existing among the trustees, he reported that he approved of the said persons as fit and proper persons *to be appointed* trustees of the charities affected by the 71st section of the 5 & 6 Will. 4, c. 76, in the place of those dead and having quitted the borough. By an order of the Lord Chancellor, dated the 28th of April, 1849, it was ordered, that the Master's report should be confirmed; and it was further ordered, that the trustees of the said charities [naming the nine old and eight new trustees] do pay the costs of the petition for the appointment of the new trustees out of the surplus funds in their hands belonging to the said charity, called "The Free Grammar School."

1850.
 }
 DOW
d.
 CHILDE
v.
 WILLIS.

The trustees met frequently in the course of the year 1849, and passed certain rules as to the management of the school. Disputes occurred between them and the defendant; and on the 16th of January, 1850, a special meeting was called pursuant to a notice addressed to the secretary, stating, that it was intended to propose the removal of the defendant from the mastership. The meeting took place, and the resolution for his removal was carried and signed by fourteen of the trustees, and the grounds thereof stated. All the formalities required by the 14th rule of the scheme were fulfilled. The defendant had not, however, any notice of the meeting, or any opportunity afforded to him to answer the charges, which he alleged were untrue in fact. By letter dated 18th February, 1850, he claimed the right to be heard in his defence, and he was allowed to be present at the meeting held on the 20th of February, pursuant

1850.

DOE
d.
CHILDE
v.
WILLIS.

to the said 14th rule, to confirm the resolution. Some discussion took place, but no regular inquiry into the truth of the charges; and the resolution was confirmed, the confirmation being signed by the same fourteen trustees who had signed the resolution. A demand of possession of the school-house and premises was subsequently made; and upon refusal to quit it this action was brought. Proceedings in equity had been taken by the defendant, but an injunction had not then been obtained.

Upon these facts, and no evidence further being offered to establish the truth or sufficiency of the charges against the defendant, it was objected on his part, that the resolution to remove him was invalid, as he had not had any notice of the charges, or any opportunity of defending himself; that it was incumbent upon the trustees to prove to the satisfaction of the jury the sufficiency of the charges; and secondly, that the appointment of some of the trustees who were parties to the action was invalid. The learned Judge, however, was of a contrary opinion upon the first point, but reserved leave to the defendant to move to enter a nonsuit upon the second. A verdict having been found for the lessors of the plaintiff,—

Whateley now moved for a new trial on the ground of misdirection, or to enter a nonsuit in pursuance of the leave reserved.—The first question is, whether the trustees have an absolute power given them by the 14th regulation, to deprive the master of his situation for any cause which may, in their opinion, justify his dismissal. By the language of that rule, the trustees have authority to remove the master from his office “upon such grounds as they shall at their discretion, in the due execution of the powers and trusts reposed in them, deem just.” This does not give the trustees an absolute discretion in the matter, but one which is subject to the proper exercise of the trust reposed in them. The grounds of removal must be just. [*Parke*,

B.—The words of the rule are, “upon such grounds as they shall deem just,” and not upon such grounds as shall be just. That appears to make their discretion so far absolute as to prevent us from interfering in the matter when they have exercised their discretion. There is a passage to be found in the judgment of the Court of Error in the case of *Regina v. Governors of Darlington School* (a), where the governors, by the letters patent, had the power given them of removing the master from the school in question “according to their said discretion,” which appears to me to be very apposite to the present question. In speaking of this power the late Lord Chief Justice *Tindal* says—“and there seems nothing unreasonable in the founders giving such authority to the governors; for there may be many causes which render a man altogether unfit to continue to be a schoolmaster, which cannot be made the subject of charge before a jury, or otherwise of actual proof. A general want of reputation in the neighbourhood—the very suspicion that he has been guilty of the offences stated against him in the return—the common belief of the truth of such charges amongst the neighbours,” and so on. In this case, a meeting of the trustees is required, to give them the opportunity of taking the question of the master’s removal into their consideration. They may come to the conclusion that the master ought no longer to preside over the school. The school may be losing its scholars. A person may take his son away from the school without giving any definite reason for so doing; and upon the same principle the trustees may, for reasons which may appear to them sufficiently well founded, be of opinion that the master is not a proper person to hold the office any longer.] In the *Fremington School Case* (b) the trustees were empowered, “upon any neglect or misbehaviour in such master, or other just cause for which

1850.
 }
 DOR
 d.
 CHILDS
 v
 WILLIS.

(a) 6 Q. B. 716.

(b) 10 Jur. 512.

1850.

DOE
d.
CHILDE
v.
WILLIS.

they or the greater number of them should agree upon and think fit, to displace the master." There Vice-Chancellor *Knight Bruce* was of opinion that the trustees had not the power of dismissal arbitrarily, but for just cause; and that they were bound to exercise that power according to principles of right, and to the general rules applicable to the administration of justice by the laws of England. [*Parke, B.*—I think the *Darlington School Case* is in point, and that this is a matter within their entire discretion, with which we cannot interfere.]

In the second place, the parties who were joined in the present action were not all properly appointed trustees. The report of the Master was confirmed by the Lord Chancellor, but that does not amount to an appointment of the new trustees, nor were the old trustees removed. [*Parke, B.*—It is equivalent to this:—"I hereby appoint A. B in the place of C. D. whom I have removed."] It was merely a report of the fitness of the parties therein named to act as trustees. The order speaks of the persons "to be" appointed. Some further order therefore was contemplated.

POLLOCK, C. B.—I am of opinion that there ought not to be a rule in this case. The Court intimated their opinion, during the first part of the learned counsel's argument, that this is a matter within the discretion of the trustees; and that, having exercised their discretion, it cannot be questioned by the present proceedings.

With respect to the second point, it appears to me that the Lord Chancellor has absolutely the power to appoint or to displace the trustees. The 25th section of the private Act, which has been referred to, appears to me to have been passed merely with the intention of dispensing with the execution of the deed; and that whatever would, before that Act, have been a good appointment, whereby the execution of a deed would have been authorised, must now be considered as a good and sufficient appointment for all

purposes to vest the property. Here the question as to the parties who are qualified to act as trustees was referred to the Master for his consideration. I think we need not trouble ourselves about the question, whether certain of those trustees were disqualified. The Master's office is to inquire into all the circumstances, and he has reported it as fit, that, instead of five persons named, and named as being dead, and three others named as being absent, eight persons who are named should be substituted as trustees in their places. The Chancellor says, "I adopt that report." Prior to the passing of the private Act, the immediate result of the adoption of that report would have been, to have caused the execution of a deed transferring the property from one set of trustees to the other. The effect of the Act is, that now, without any such deed, the persons so recommended by the Master and so approved of by the Chancellor, become ipso facto trustees. There can be no doubt about the meaning of the Chancellor's order; for, as has been observed by my learned brothers, the order actually treats them as trustees, and directs them to pay the costs out of the fund.

1850.

DOE
d.
CHILDS
v.
WILLIS.

PARKE, B.—I am of the same opinion. With respect to the first question, whether this is in the discretion of the trustees or not, I entirely concur in the opinion of my brother *Williams*, that it is; and that it is a matter on which there really can be no question at all.

The next question is, whether the thirteen trustees in whose names this ejectment is brought, were really the trustees. If they were not, then the proceedings to remove the master were irregular. Unless there were two-thirds of the existing trustees present at the meeting, and two-thirds of that two-thirds concurred in the vote of removal on two occasions, their proceedings would amount to nothing. If it becomes essential that two-thirds of the seventeen trustees should upon two occasions have concurred in the

1850.

DOE
d.
CHILDE
v.
WILLIS.

vote, if there were seventeen persons not correctly appointed trustees, there would have been two objections: first, that the removal was improper; and secondly, there would be a question as to the quantum for which the verdict was to stand. I am clearly of opinion, that upon this evidence those seventeen trustees were correctly appointed. By the Municipal Corporation Act, power is given to the Lord Chancellor in the meantime, until an Act should be passed to enable him, to make such directions as he should think fit for the administration and management of the trust fund, and to appoint trustees for that purpose. Then the private Act, which was introduced for the purpose of settling disputes in the school, vests all the property of the school in the trustees; and the effect of the interpretation clause is to vest it in the trustees from time to time duly appointed by the Chancellor, without the intervention of any conveyance. Then the case is reduced to the determination of the question, whether or not the seventeen trustees mentioned in the declaration have been duly appointed by the Chancellor. There is certainly some informality in the proceeding on the part of the Chancellor, but his meaning is perfectly clear. A reference was made by the Court to Master *Brougham*, not to appoint, but to inquire who were proper persons to be appointed, in the place of eight of these persons. A certain reason was suggested for the Chancellor's consideration as a good cause for removing the trustees. Undoubtedly the removal is within the discretion of the Chancellor. Master *Brougham* inquires into the fact upon evidence brought before him, and he reports that it is proper to appoint eight trustees in lieu of that number, who are dead or have quitted the borough. That recommendation amounts to nothing, unless it is confirmed by the Chancellor. When the matter comes before the Chancellor, instead of making an order expressing the fact upon which the eight trustees have become disqualified, and

expressly appointing new trustees in their place, he merely confirms the Master's report. But if you look at the order confirming the report, no one can doubt that the effect of it is to appoint those persons trustees in lieu of others; and that, consequently, it would be in itself both a removal of the former trustees and the appointment of new ones. That appears not merely by the terms of the order confirming the report, and which directs that effect shall be given to the report, but by the latter part of the order, which states, that those persons therein named are to pay the costs of the petition out of the charity funds, clearly shewing that the charity funds were meant by him to be vested in those trustees; and, therefore, I think in this case, that although the proceeding may be informal, there is no doubt that substantially the Chancellor has given an opinion upon it, and has appointed those seventeen persons trustees. By the effect of the private Act, all the estates were vested in them. All their proceedings are regular.

ALDERSON, B.—I am of the same opinion. It seems to me clear, according to the scheme approved of by the Master, that the trustees have generally absolute discretion to interfere. I suppose it was thought that, upon the whole, it would be more convenient that the trustees should possess an unlimited discretion, than that a party should have it in his power to perplex them by perpetually requiring strict proof. Therefore, in a choice of evils, they probably chose what they considered the less. It is sufficient for us to say, that there is that discretion; and the trustees having exercised it, in point of law the defendant is legally removed. Then the question is, are these the proper trustees to exercise that discretion? That depends on whether the Chancellor's order for their appointment is sufficient. It seems to me that the appointment of the trustees would have been in a better form, if the Chancellor had adopted the simple mode of saying, "I hereby appoint so

1850.

DOE
d.
CHILDER
v.
WILLIS.

1850.

DoB
d.
CHILDE
v.
WILLIS.

and so." Probably the reason that has not been done was, that at the time these forms were first adopted, they were consummated by the execution of a deed, and consequently at that time the form was perfectly appropriate. When the necessity for the deed was removed, the form might have been altered to advantage. The meaning, however, of the Lord Chancellor's order is perfectly clear, for in effect he says, "I approve of the Master's report, by which the Master says these are fit people to be appointed; and I direct the trustees, including by name these people as trustees, out of the trust funds to pay a certain sum of money." No one can doubt, that under these circumstances the Lord Chancellor has appointed them trustees, for he has ordered them to act as such.

Rule refused (a).

(a) But see *Willis v. Childe*, 13 Beav. 117, Jan. 14, 1851, where Lord Langdale, M. R., granted an injunction to restrain the trustees from removing the plaintiff, being of opinion that the 14th regulation did not confer such arbitrary power upon them.

Nov. 25.

LEWIS v. FORSYTH (b).

Where the defendant's affidavits, on a motion for a suggestion under the County Courts Act, to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the county court of B., which facts were denied by the affidavit of the plaintiff, the Court refused to determine the question on affidavits, and directed a suggestion to be entered.

IN this case a rule had been obtained on the part of the defendant to enter a suggestion to deprive the plaintiff of costs, under the 9 & 10 Vict. c. 95.

The plaintiff had obtained a verdict in this Court, in an action for work and labour, for the sum of 12*l.* 13*s.* The affidavit on which the rule had been obtained stated, amongst other things, that the plaintiff resided within

(b) Before *Platt*, B., sitting alone.

twenty miles of the residence of the defendant, and that the cause of action arose wholly within the jurisdiction of the Bloomsbury County Court. The affidavit in support of the rule denied that the parties resided within twenty miles from the residence of each other; and stated, that the cause of action arose within the jurisdiction of the Clerkenwell Court, and not within the jurisdiction of the Bloomsbury County Court.

1850.
 {
 LEWIS
 v.
 FORSYTH.

Hawkins shewed cause.—The entry of a suggestion ought not to be granted, as the facts stated in the affidavit on which the rule was obtained are wholly denied. The plaintiff may be indicted for perjury, but this rule ought to be discharged. In *Caterer v. Dean* (a), the defendant's affidavit stated that the contract was made within the jurisdiction of a certain county court, and was contradicted by the plaintiff's affidavit; and *Coleridge, J.*, sitting in the Bail Court, refused to allow the suggestion to be entered, holding it to be the duty of the Court, under the circumstances, to dispose of the matter on the affidavits, and not to allow the question to be tried by a jury on a traverse of the suggestion.

Horn, in support of the rule.—The case of *Caterer v. Dean* was decided upon its own peculiar circumstances, the only point there being, whether the contract was made within the jurisdiction of the county court. In the present case, the residence of the two parties is a fact which ought to be tried by a jury, and cannot be determined by the Court. The rule as to this point is laid down in *Watson v. Quilter* (b). *Broad v. Carey* (c) is directly opposed to *Caterer v. Dean*. There the plaintiff's affidavit denied the allegations of the place of the plaintiff's residence, and of the

(a) 19 L. J., Q. B., 326.

(b) 11 M. & W. 760.

(c) 19 L. J., Exch., 283.

1850.
 {
 LEWIS
 v.
 FORSYTH.

place where the cause of action arose. The decision was this: "The Court cannot enter into the question upon conflicting affidavits. The plaintiff must traverse the suggestion." In *Nolloth v. Crook*(a), the Court allowed a suggestion to be entered to try the question as to the parties residing within twenty miles of each other. *Mills v. Best*(b), decided by *Coleridge, J.*, is also in favour of this motion.—He was then stopped.

PLATT, B.—The rule must be absolute for entering the suggestion, which the plaintiff may traverse, if he is inclined to do so.

Rule absolute.

(a) 19 L. J., Q. B., 185.

(b) Id. 328.

MEMORANDUM.

IN the present Term, *Robert Miller*, of the Middle Temple, Esq., was called to the degree of the coif, and gave rings with the motto, *Honestè niti*.

Exchequer Reports.

MICHAELMAS VACATION, 14 VICT.

MACBRY v. SCOTT.

1850.

Dec. 5.

DEBT upon a judgment for 10,002*l.* 13*s.* recovered by the plaintiff against the defendant in the Court of Queen's Bench in Ireland. Plea, that at the time when the said judgment was recovered, the defendant was not indebted to the plaintiff in any sum or sums of money whatsoever; and that the said judgment was so recovered by the plaintiff against the defendant with the defendant's assent, as a surety only, and not otherwise, for certain other persons, that is to say, one Peter Scott, one John Scott, and one Thomas Scott, (hereinafter described as Scott Brothers), to secure the due payment by the said persons to the plain-

Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for S. & Co., to secure payment of monies advanced to them by the plaintiff; and that S. & Co. paid all monies due from them to the plaintiff,

for which the judgment was to be such security. Replication, that, after the recovery of the judgment, an indenture was made between S. & Co. and the plaintiffs, whereby, after reciting the judgment, and various unsettled accounts between S. & Co. and the plaintiff, it was witnessed, that, for the sake of winding-up the said transactions, S. & Co. and the plaintiff agreed (inter alia) that the plaintiff should advance to a certain banking Company 800*l.* guaranteed by him on behalf of S. & Co., and should also advance to S. & Co. 200*l.*, and that 1000*l.* should be the debt thenceforth due from S. & Co., which should be payable with interest, and that the agreement should be without prejudice to the judgment against the defendant. Averment, that, after the making of the indenture, and before the execution thereof by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised the plaintiff that the judgment should remain as a security for the repayment of the 1000*l.* and interest; that the plaintiff executed the deed and advanced the sums of 800*l.* and 200*l.*; but that S. & Co. had not repaid the same. Rejoinder, that the defendant did not promise modo et forma, and issue thereon. At the trial, the plaintiff gave in evidence the following memorandum, which was signed by the defendant and another surety before the plaintiff executed the deed:—"We hereby consent to the within deed being executed by and between the parties thereto, and that the same shall be without prejudice to the plaintiff's rights and remedies under his judgment against us, and that the said judgment shall remain in full force and effect." This memorandum had been annexed to the deed, but was detached and sent to the defendant, who signed it without seeing the deed:—*Held*, that, assuming this was a transaction within the 4th section of the Statute of Frauds, which *seem* it was not, there was a sufficient memorandum in writing to satisfy the statute, since the document signed by the defendant incorporated so much of the deed as formed the consideration and promise.

1850.
MACBORY
v.
SCOTT.

tiff of any sum or sums of money which the said persons at the time of the said recovery owed, or which they at any time might thereafter owe to the plaintiff, for and in respect of monies advanced or to be advanced by the plaintiff to them; that Scott Brothers, after the said recovery, and before &c., to wit on &c., settled, paid, satisfied, and discharged all monies then due and owing from them to the plaintiff, for which the said judgment was such security as aforesaid; and the plaintiff then accepted and received such settlement, payment, satisfaction, and discharge of such monies; and that before and at the time of the commencement of this suit, there was not any money due or owing to the plaintiff from Scott Brothers, for or in respect of any monies at any time advanced by the plaintiff to those persons, for which the said judgment was to be such security as aforesaid. Verification.

Replication.—That, after the recovery of the judgment, an indenture, dated the 3rd of October, 1846, was made between Scott Brothers of the one part, and the plaintiff of the other part, (profert), which recited, that expenses had been incurred by the plaintiff for Scott Brothers, and advances made to them, and an agreement made to secure the said advances by the joint and several bond of Scott Brothers, and the defendant and W. Trowsdale as sureties; and that the said parties had given their joint bond and warrant of attorney for 10,000*l.*; that Scott Brothers had deposited leases with the plaintiff; and that further advances had been made by the plaintiff, and monies received by him on account of Scott Brothers; and that the plaintiff had been employed as attorney in a suit of Scott Brothers against the Dublin and Drogheda Railway Company; that on the 1st of June, 1845, an account between them and the plaintiff was come to, when Scott Brothers were found to be indebted to the plaintiff in 2700*l.*, including the plaintiff's costs, which account was signed by them and the plaintiff; that thereupon, for further securing the

2700*l.*, and in consideration of a letter of guarantee to the Ulster Banking Company, enabling Scott Brothers to obtain advances not exceeding 800*l.*, Scott Brothers executed a power of attorney to the plaintiff, to receive all monies due from the Railway Company to them, but without prejudice to the securities held by the plaintiff; that according to a previous agreement, a counter guarantee from Messrs. Connell & Sons to the plaintiff was procured by Scott Brothers; that Scott Brothers sued the Dublin and Drogheda Railway Company, and recovered 2799*l.* 14*s.* 3*d.*, which amount was paid to the plaintiff, still leaving a large sum due to him in addition to the 800*l.* which had been advanced by the Ulster Bank; that Scott Brothers changed their attorney, and required the plaintiff to furnish his bills of costs, which amounted to 1245*l.* 12*s.* 11*d.*; that they were not taxed, but the plaintiff received 500*l.* costs from the Railway Company; that in consequence of disputes as to the various transactions, it had been agreed to come to a final settlement: and by the said indenture it was witnessed, that for the sake of winding up the said transactions, Scott Brothers jointly and severally covenanted with the plaintiff, and the plaintiff with them, for the performance of the agreement therein contained, namely, first and secondly, that they should execute mutual releases; thirdly, that the plaintiff should receive all costs then payable by the Dublin and Drogheda Railway Company to Scott Brothers; fourthly, that the plaintiff should look to the Company alone for his costs in the action, and make no further claim upon Scott Brothers in any way relative to costs; fifthly, that Scott Brothers should not tax the bills or question the accounts; sixthly, that the plaintiff should forthwith advance to the Ulster Banking Company the sum of 800*l.*, guaranteed by him as afore-said on behalf of Scott Brothers, and should also forthwith advance and lend to Scott Brothers the further sum of 200*l.*, which they desire to apply to the payment of

1850.
MACROBY
v.
SCOTT.

1850.
 MACBRY
v
 SCOTT.

other liabilities incurred in completion of their aforesaid contract; and therefore and from thenceforth Scott Brothers should stand and be jointly and severally liable to the plaintiff for the clear principal sum of 1000*l*., which should be taken as the full debt thenceforth due to him by Scott Brothers; seventhly, that the said principal debt or sum should be payable to the plaintiff, with interest for such time as he allows it to remain outstanding, at 6*l*. per cent. per annum; eighthly, that this agreement should be without prejudice to the security afforded to the plaintiff by the aforesaid equitable mortgage, and (so far as the parties hereunto could) to the aforesaid counter-guarantee from Messrs. Connell & Sons, and to the aforesaid securities from the defendant and W. Trowsdale; and that the aforesaid sum of 1000*l*. with interest, thereby fixed upon, should remain secured by the said equitable mortgage, and the said judgments against Scott Brothers, and (so far as the parties thereunto could) by the said judgments against the defendant and W. Trowsdale, and also (to the extent of the said guarantee so paid to the Ulster Banking Company) by the said counter-guarantee from Messrs. Connell & Sons; ninthly, Scott Brothers also agreed, if thereunto required by the plaintiff, to do their best to procure from the defendant and W. Trowsdale, and from Messrs. Connell & Sons, a recognition of the aforesaid eighth article, and an assent to allow their aforesaid several securities to remain so charged and chargeable as aforesaid; tenthly, that Scott Brothers would pay the 1000*l*. to the plaintiff. The replication then stated, that, after the making of the said indenture, and before the execution thereof by the plaintiff, and before the commencement of this suit, to wit, on &c., in consideration that the plaintiff, at the request of the defendant, would execute the said indenture, and would forthwith advance to the Ulster Banking Company the sum of 800*l*. so guaranteed by him on behalf of Scott Brothers, and would forthwith advance and lend to

Scott Brothers the further sum of 200*l.*, the defendant then promised the plaintiff, that the said judgment should stand and remain in full force against him the defendant, as a security to the plaintiff for the repayment to him of the said sum of 1000*l.* and interest in the indenture mentioned. Averments: that the plaintiff executed the indenture, and advanced to the Ulster Banking Company 800*l.*, and to Scott Brothers 200*l.*, but that Scott Brothers had not repaid the same or any interest thereon; and that the defendant had notice thereof, and had been requested to pay, but had not paid the same.—Verification.

Rejoinder, that the defendant did not promise modo et formâ.—Issue thereon.

At the trial, before *Maule, J.*, at the last Spring Assizes for Surrey, the plaintiff, in support of the replication, gave in evidence the indenture, and also the following memorandum, signed by the defendant and W. Trowsdale, the other surety:—

“We do hereby consent to the within deed being executed by and between the parties thereto, and that the same shall be without prejudice to the within-named Adam Macrory’s rights and remedies under his several judgments for 10,000*l.* entered up as well against us as against Peter Scott, John Scott, and Thomas Scott respectively, in the Queen’s Bench, in Hilary Term, 1844, to recover thereunder the sum of 1000*l.*, and interest (now ascertained to be due on foot thereof), notwithstanding the said deed or any other dealings between the said parties, and therein more particularly referred to; and that the said judgments shall severally be and remain in full force and effect against each of us, our heirs, executors, and administrators, in order to secure the said sum of 1000*l.* and interest, so as aforesaid ascertained to be due. Witness our hands this 3rd day of October, 1843.”

This letter was annexed to the indenture at the time it was sent to Scott Brothers, in Dublin, for execution; but

1850.
MACRORY
v.
SCOTT.

1850.
MACRORY
v.
SCOTT.

it was afterwards detached from the deed and sent to the defendant in England, with the following letter from Scott Brothers:

"We have now got a full settlement with Macrory (the plaintiff), he is to advance us some money, for which we have given him a bond for 1000*l.*; he wants your name along with Trowsdale's, and if you will have the goodness to sign the inclosed, and return in due course, we shall feel much obliged." The defendant accordingly signed the letter, and returned it to Scott Brothers, who appended it to the indenture, which was then delivered to the plaintiff. On the part of the defendant a letter was put in, signed by the plaintiff, and addressed to his legal adviser, by way of instructions for the indenture; which letter, after detailing the facts, contained the following passage:—"A settlement of all matters in dispute has been agreed upon this day to the following effect:—That I am forthwith to lift the guarantee of 800*l.* from the bank, so as to enable Scott Brothers to get discounts made. I am also to advance them 200*l.*, so as to make the demand due to me even 1000*l.*, and which is to be secured by securities I hold; or at all events the 1000*l.* is to be the ascertained and settled amount between us on foot of all securities I hold, and each party is to release the other (save as to this 1000*l.*) from all demands, accounts, and reckonings of every kind; and I have stipulated that this arrangement is to be carried out in such manner as you may suggest." At the end of the letter was the following note:—"I have read the foregoing letter, which embodies the basis of the arrangement which we are desirous of carrying out." (Signed) T. Scott, for Scott Brothers, August 21, 1846.

There was conflicting evidence whether the plaintiff executed the indenture before or after the defendant signed the letter of the 3rd of October; but the jury found that it was after. It was objected, on the part of the defend-

ant, that this was an undertaking to be answerable for the debt or default of another within the Statute of Frauds, and that there was no sufficient note or memorandum in writing. Also, that the letter was a mere consent that the judgment should remain as a security; and that the agreement alleged in the replication was not proved. His Lordship overruled the objections, and a verdict was found for the plaintiff, leave being reserved for the defendant to move to enter a nonsuit.

A rule nisi having been accordingly obtained, or for a new trial,

Shee, Serjt., and *Willes* shewed cause.—Without considering whether the plea affords any defence, inasmuch as it admits a judgment subsisting against the defendant, it is submitted, that this is not a case within the Statute of Frauds, for there was no undertaking to pay the debt of another, but merely an agreement that an existing judgment should continue as a security for further advances. Assuming, however, that a note or memorandum in writing was necessary, the letter of the 3rd of October is sufficient to satisfy the statute. It refers in specific terms to the deed, and must therefore be considered as incorporating its provisions. The transaction is, in effect, this:—in consideration that the plaintiff would discharge Scott Brothers from all their existing liabilities, and would pay to the Ulster Banking Company 800*l.*, and would also advance to Scott Brothers 200*l.*, the defendant agreed that the judgment against him should remain as a security for the 1000*l.* That is the agreement proved.

The Court then called on

Bovill to support the rule.—It is admitted by the pleadings that the judgment was given only as a security for advances; and that when this new arrangement was made,

1850.
 MACBRY
 v.
 SCOTT.

1850.
MAGROBY
v.
SCOTT.

the whole had been repaid. If therefore the letter of the 3rd October amounts to an agreement that the judgment shall remain as a security for a new advance of 1000*l.*, which by the sixth article the plaintiff is bound to make, then it is an undertaking to be answerable for the debt or default of another, and is void under the Statute of Frauds, there being no note or memorandum in writing shewing on the face of it the consideration for the promise. If, on the other hand, the letter is, as it purports to be, a mere consent by the defendant that the judgment shall remain as a security, then the agreement alleged in the replication is not proved. [*Parke, B.*—Does not the memorandum incorporate the deed by reference to it?] The defendant is no party to the deed, and could not have enforced any of its covenants.

PARKE, B.—I am of opinion that this rule ought to be discharged. The question is, whether the contract is proved, that is, the consideration and promise as alleged in the replication. [His Lordship stated the plea and replication.] First, it is said that there ought to be a note or memorandum in writing, because this is a promise to be answerable for the debt or default of another within the Statute of Frauds. But I do not think this case is within that statute. It is not directly a promise to pay the debt of another, but an agreement, stating that property already pledged for one debt shall remain pledged for another. Although the ultimate effect is that the debt may be paid, yet the immediate object is merely to appropriate the fund in a different manner. It therefore falls within the principle of the decision in *Castling v. Aubert*(a). It is not necessary, however, to decide that point, though I feel no doubt upon it, because, in my opinion, the agreement is proved by a note or memorandum

(a) 2 East, 325.

1850.
 MACRORY
 v.
 SCOTT.

in writing, in the very terms alleged in the replication. It appears that a memorandum was prepared, which was intended to be annexed to the deed, and was sent to the defendant in England for his signature, and returned by him in order to be appended to the deed. If the defendant chose to trust his brother to annex this instrument to the deed, he is precisely in the same situation as if he had signed the memorandum with the deed appended to it, or if the memorandum had been indorsed on the deed and then signed. Therefore the question is, what is the true construction of the instrument? It commences thus:—"We hereby consent to the within deed being executed by and between the parties thereto." So that, at that time, supposing the two Scotts had executed the deed, the instrument could only have reference to the plaintiff, and mean, in consideration that he would execute it. It then proceeds:—"And that the same shall be without prejudice, &c." [His Lordship read the memorandum.] That is a positive engagement on the part of the defendant that this judgment shall be a security for the 1000*l.* which the plaintiff was to advance. I think it is to be collected from this instrument alone, without referring to the deed, that one of the considerations was that the plaintiff would execute the deed. That, however, is not the only consideration; for, if the deed be imported into the memorandum, which I think it must be, because the words "the within deed" incorporate all the provisions of the deed with that new agreement, there is this further consideration, that the plaintiff would advance the 800*l.* and 200*l.*; for the judgment is to be a security only provided those sums are advanced, otherwise there is no 1000*l.* to secure. So that, even supposing Mr. *Bovill's* argument right, that there must be a memorandum in writing, there is a sufficient memorandum; and then, by importing into it so much of the deed as will render it intelligible, the true consideration for the agreement is, the plaintiff's executing the deed,

1850.
MAGBORY
v.
SCOTT.

and also advancing the 800*l*. and 200*l*. I therefore think that the direction of the learned Judge was right.

ALDERSON, B.—I am of the same opinion. The only question is, whether the consideration for the contract is correctly stated in the replication. Now, if the agreement be looked at, it will be found to be a general agreement, which settles the accounts of these parties between themselves. There are various parts of it with which the present defendant has nothing to do; but there are two parts, and two only, to which his attention would necessarily be directed, and for which his consent would be required. Those are the sixth and seventh articles, which are in these terms: [His Lordship read them.] Then there is a memorandum, which was intended to be annexed to the deed, and which I shall treat as if written in the margin opposite the particular stipulation affecting the defendant. He therefore writes in the margin, so to speak, of the deed, "We hereby consent to the within deed being executed, &c." [His Lordship read the memorandum.] It is precisely the same thing as if the defendant had said, "to this portion of the deed I hereby give my assent." Then, what is the bargain? It is, in consideration that you the plaintiff will do as you undertake to do by the sixth and seventh articles, I the defendant agree to do what I undertake by the eighth. That is the agreement stated in the replication, and which appears to me proved.

PLATT, B.—I also think that the rule ought to be discharged. This is an action on an Irish judgment, and the plea does not deny that the judgment was recovered; but states that it was recovered for the purpose of securing the repayment of certain advances made by the plaintiff; and it then goes on to state that those advances have been repaid. But although the sums intended to be secured by the judgment have been repaid, there has been no satis-

faction of the judgment, and it still remains a valid and effectual judgment upon which the plaintiff might have sued out execution, although a Court of Equity, or perhaps the Court in which the judgment was recovered, would have prevented that execution from being available. The plaintiff, by his replication, does not admit that the judgment was satisfied; on the contrary, he insists that it is still available, and that, being so available, the defendant entered into a bargain by which he made it a security for another debt. That agreement having been traversed, the question is, whether it was proved. Now, there is a memorandum, which must be taken to be on the deed itself, by which the defendant consents that the judgment shall be of full effect to secure the repayment of the 1000*l.* mentioned in the deed. It was not necessary to state more than that portion of the deed which had reference to this undertaking of the defendant; and therefore, as it seems to me, this memorandum, referring as it does specifically to the deed, takes out of the deed, by reference, all those terms which constitute the consideration for the defendant's undertaking that the judgment should remain available. That being so, there was evidence to support the finding of the jury. Upon the face of the memorandum, it appears that it was then in the contemplation of the parties signing it, that the deed should be afterwards executed. For these reasons, it seems to me that the direction was right, that the verdict is right, and that the rule ought to be discharged.

MARTIN, B.—I am of the same opinion. The substance of the arrangement was, that the defendant, who had been a party to a former judgment, should permit the judgment to remain as a security for 1000*l.*, which was to be advanced and given by the plaintiff to the Ulster Banking Company on the terms of his discharging Scott. The transaction is in effect this: — "I the defendant will consent to the

1850.
 MAORORY
 v.
 SCOTT.

1850.
 {
 MACBRY
 v.
 SCOTT.

judgment against me remaining as a security, if you the plaintiff will wipe off all existing demands against Scott & Co., and advance 800*l.* to the Ulster Bank, and 200*l.* to Scott & Co." To my mind, this is clearly not a case within the Statute of Frauds. It is not an undertaking to answer for the debt, default, or miscarriage of another; but an agreement that a certain existing obligation shall continue. The cases, all of which will be found in the note to *Forth v. Stanton* (a), establish that for the purpose of bringing a contract within the Statute of Frauds, it must be an engagement for the debt, default, or miscarriage of another, which this is not. So that, even if it had been a parol contract, it would have been perfectly good, as the Statute of Frauds does not apply.

Rule discharged.

(a) 1 Saund. 211 b.

Dec. 6.

ELY v. MOULE and TOMBS.

A debtor summoned to a county court failed to appear, whereupon the judge verbally ordered that he pay the debt and costs "forthwith." About five o'clock in the afternoon of the same day, the bailiff served the debtor with an order, under the seal of the Court, "to pay the debt and costs to the clerk of the court, at his office, forthwith, &c. Attendance from ten till four." The defendant having refused to pay, the bailiff took his goods in execution:—*Held*, that the verbal order to pay was in effect a judgment, and therefore no service of the order was necessary before execution. *Semble*, that where an order is made by the judge, and afterwards varied as to the time of payment, it must be drawn up and served before execution can issue.

TRESPASS for breaking and entering the plaintiffs dwelling-house, and seizing his goods.

The defendant Moule pleaded (*inter alia*) that heretofore, to wit, on &c., he levied his plaint in the county court of Worcestershire, holden at Droitwich, against the now plaintiff, for the recovery of a debt of 18*l.* 13*s.* 6*d.*; that the plaintiff, being duly summoned, did not appear, whereupon the defendant recovered judgment for that amount, together with 3*l.* 18*s.* 6*d.* costs; which sums were by the court ordered to be paid forthwith to the clerk of

the court at his office at Droitwich; that the plaintiff disobeyed the said order in this,—that he did not pay the said sums, or either of them, or any part thereof, to the clerk of the said court at Droitwich forthwith, but wholly omitted so to do; whereupon, and after default made in such payment, the said clerk, at the request of the defendant, issued a fieri facias under the seal of the court, as a warrant of execution to the high bailiff thereof, empowering him to levy on the goods of the plaintiff; by virtue of which the high bailiff entered the plaintiff's dwelling-house, and seized and took his said goods, and levied the same sum of money by distress and sale, &c.; quæ sunt eadem.—Verification.

The defendant Tombs, who was clerk of the county court, pleaded a similar justification.

Replications, admitting the matters of record stated in the pleas, de injuriâ absque residuo causæ.—Issues thereon.

At the trial, before *Williams, J.*, at the last Worcestershire Summer Assizes, it appeared that the defendant Moule had entered a plaint in the county court at Droitwich against the now plaintiff, for a debt of 18*l.* 13*s.* 6*d.* The cause came on to be heard on the 13th of August, 1849; when the now plaintiff, although duly summoned, did not appear, and the judge made a verbal order that he pay the debt and costs forthwith. The now plaintiff resided nearly four miles from Droitwich; and, about five o'clock in the afternoon of the same day, the bailiff went to his house and demanded payment, and served him with the following order under the seal of the court:—

1850.
 {
 ELY
 v.
 MOULE.

“In the County Court of Worcestershire, at Droitwich.

“Between John Moule, Plaintiff,
 and
 John Ely, Defendant.

“Upon hearing this cause, at a court holden at the court-house, Droitwich, on the 13th day of August instant,

1850.

ELY
v.
MOULB.

it is adjudged that the said plaintiff do recover against the said defendant the sum of 18*l*. 13*s*. 6*d*. his debt, together with the costs of suit amounting to the sum of 3*l*. 18*s*. 6*d*.: and it is ordered that the said defendant do pay the same to the clerk of the court at his office in Droitwich forthwith.

"Given under the seal of the court, this 13th day of August, 1849.

"By the Court.

"SAMUEL TOMBS, Clerk

"Debt	£18 13 6
Costs	3 18 6
Execution	1 6 0
	<hr/>
	£23 18 0
	<hr/>

"Attendance at the office from ten till four o'clock."

The defendant having refused to pay, the bailiff took his goods in execution, under a warrant from the court for that purpose. It was objected, on the part of the plaintiff, that the execution was illegal, inasmuch as the order of the court should have been served upon the defendant, and at such a time as to afford him a reasonable opportunity of complying with it. The learned Judge overruled the objection, and a verdict was found for the defendant, leave being reserved to the now plaintiff to move to enter a verdict, with 30*l*. damages. A rule nisi having been obtained accordingly,

Whateley and *Gray* now shewed cause. — The 9 & 10 Vict. c. 95, does not require an order of this description to be served on the defendant. The 94th section enacts, "that whenever the judge shall have made an order for the payment of money, the amount shall be recoverable in case of default or failure of payment thereof forthwith, or at the time or times and in the manner hereby directed,

by execution against the goods and chattels of the party against whom such order shall be made," &c. And, by the 80th section, "if, on the day named in the summons, &c., the defendant shall not appear, or sufficiently excuse his absence, or shall neglect to answer when called in court, the judge, upon due proof of service of the summons, may proceed to the hearing or trial of the cause on the part of the plaintiff only, and the judgment thereupon shall be as valid as if both parties had attended." [*Parke, B.*—The question depends upon this, whether the order to pay is like a judge's order or rule of Court, which require service, or whether it is a judgment.] It resembles a judgment. If the defendant had been present in court when the order was made, and had refused to pay, it is clear that no service of the order would have been necessary before execution. Then the defendant having been summoned, and having failed to appear, the case proceeds in precisely the same way as if he were present; otherwise a defendant who disobeyed the summons would be in a better situation than one who appeared. The object of the statute, in enabling the judge to order immediate payment, was, that debtors might not have an opportunity of removing their goods. The duty to pay arises as soon as the judge has pronounced the order. If notice be held necessary, endless questions will arise as to the sufficiency of service. *Wootton v. Harvey*(a) is an authority in support of this view. That case arose under the 42 Geo. 3, c. 90, s. 6, which enables a magistrate to make an order for payment of servants' wages in certain cases, and directs that, "in case of refusal, or non-payment of any sum so ordered for twenty-one days after such determination, he may issue his warrant to levy the same by distress and sale;" and gives an appeal to the sessions within twenty-one days: the twenty-one days having elapsed between the making of the order

1850.
 }
 ELF
 v.
 MOULB.

(a) 6 East, 75.

1850.

ELY
v.
MOULB.

and the appeal, and also twenty-one days after the appeal was dismissed before the warrant of distress issued, it was held, that the magistrate was justified in issuing the distress order, without proof of any new demand of the money subsequent to the order of sessions on the appeal. So here, no previous demand of the money was necessary; and even if it were, the refusal to pay dispensed with it.

Keating and *Huddleston*, in support of the rule.—It is not contended that, under the 9 & 10 Vict. c. 95, the judge might not have made an order for payment in such a form that the amount would have been payable *forthwith*, without notice; but it is submitted that where, as in this case, the judge, having distinct authority under the 92nd, 94th, and 95th sections, makes an order which expresses the manner and time of payment and the person to whom the money is to be paid, such an order cannot be disobeyed until the party against whom it is made has had notice of it, so as to render a compliance with its requisitions at least possible. If this money had been ordered to be paid by monthly instalments, could it be contended that execution might issue without notice at the expiration of the first month. The defendant is ordered to pay the money to the clerk of the court at his office, and between the hours of ten and four. [*Platt*, B.—That is a statement of the period during which the defendant is to have indulgence, and a notice that he must be at the office before it is closed.] Suppose an order made a few minutes before four o'clock, and that the clerk of the county court resided some miles distant, how could the defendant comply with the order? [*Parke*, B.—The defendant ought to have been present in court; and, not having appeared, the statute enables the court to deal with the case as if he were present; therefore he must be considered in the same situation as if he had been in court when the order was made on him to pay the debt and costs *forthwith*. Then no service of the order is necessary; for it is a judgment of

the court. The fallacy is in treating this order as a Judge's order made without notice; whereas it is a judgment, constructively made in the presence of the defendant.] The 94th section contemplates a formal order in writing, not a mere verbal judgment. By the 78th section, five of the judges of the superior Court are empowered "to make and issue all the general rules for regulating the practice and proceedings of the county courts holden under that Act; and also to frame forms for every proceeding in the said courts, for which they shall think it necessary that a form be provided, &c.; and the rules so made and the forms so framed shall be observed and used in all the courts holden under that Act." In pursuance of that provision, a series of rules and forms have been drawn up by the judges; and Form 23, which is a form of order for the payment of money, is in the same terms as this order, with the exception of the word "forthwith." [*Parke*, B.—That is the form which is to constitute the record of the judgment.] Rule 14 directs, "that the preceding rules, &c., as to the mode of service of summonses to appear to a plaint, shall apply to the service of all summonses, *judgments*, orders, notices, and processes whatsoever, issuing under the authority of the said Act, except where otherwise directed by the said Act, or any rule under the authority thereof." By Schedule D. a fee is allowed for the service of any summons, *order*, subpœna, &c. [*Alderson*, B.—That means interlocutory order. *Parke*, B.—I do not find any case in which the service of a judgment is required by the statute. *Whateley* suggested that the 14th rule probably had reference to sections 99 & 101.] There is no analogy between the proceedings in the county courts and those in the superior Courts. In the latter, if a defendant suffers judgment by default, he has notice of taxation, and so is aware of the amount of debt and costs. In the county court there is no judgment by default through the defendant not appearing, but the judge must nevertheless

1850.

ELY

v.

MOULE.

1850.

ELY

v.

MOULN.

hear the case, and the plaintiff may be nonsuited or recover less than his claim; so that until notice the defendant cannot know what amount he is to pay. These orders resemble those of justices of the peace, which have no force unless they are served: *Rex v. The Justices of Lancashire* (a), *Gibbs v. Stead* (b). Besides, the judge may, on consideration, vary his order as to the time of payment.

PARKE, B.—The rule must be discharged. I felt considerable reluctance in granting it, and only consented for the purpose of having the question, which is of great importance, fully considered. According to the argument of the plaintiff's counsel, nothing can be done under a judgment of a county court, unless the order is reduced to writing, and served. If that were so, the costs would be greatly increased by endeavours to serve the order; and, in addition, the service would give an opportunity to the defendant to evade payment of the debt by removing his goods. It is fit, therefore, to consider whether such is the true construction of the statute. On full consideration, I am of opinion that it is not necessary to serve the order; for in all Courts, the suitors, who are present, are bound to take notice of the judgment of the Court, without any service upon them; and, by the 80th section of the 9 & 10 Vict. c. 95, a person who has been summoned to the county court, and neglects to attend, is in the same situation as if he were personally present at the hearing of the cause. An order of this description is in the nature of a judgment, not of a rule of Court, and therefore, on the principle already stated, the defendant is bound to take notice of the amount adjudged to be paid, and of the time for payment; and if he does not comply with the order, the court is authorised under the 94th section to issue execution. Here the judgment of the court is, that the plaintiff recover his debt with

(a) 8 B. & C. 593.

(b) *Id.* 528.

costs, and an order is made for payment "forthwith;" then, if the party, who is presumed to be present, (for his not appearing is equivalent to it), does not pay, he is liable to have his goods taken in execution. It is said, however, that the Judges, by the rules which they framed, have considered that orders and judgments are to be served. But those rules are not a judicial exposition of the statute, for they were not made in open Court after hearing an argument on both sides, although no doubt they would lead us to consider well the statute before coming to a decision. The rule referred to supposes that there are cases in which orders are to be served, and also in which judgments are to be served. With respect to orders, if the judge of the county court, after judgment pronounced in open court, chose to vary the time for payment by a subsequent order, that would be like a rule of a superior Court, and must be served. I have looked in vain for a case where the Act requires service of a judgment. Perhaps the Judges, by the rule in question, intended to provide for all possible cases; and there may, indeed, be some in which it would be necessary to serve notice of a judgment, as, for instance, if the court ordered an attachment to issue against a party upon service of the notice of a judgment, or if an absent party were ordered to pay money within a certain time after service of the judgment upon him. What is here called an order is in truth a part of the judgment, and, on general principles of law, every suitor must take notice of what the Court pronounces. There is a well-known distinction which illustrates this. If a warrant of commitment is pronounced by the Court in the presence of the party, no written warrant is necessary to justify an officer in arresting him; but if not awarded in open Court, there must be service of a written warrant. I am glad to be enabled to come to this conclusion, for if proceedings in county courts are to be incumbered with all the formalities of the superior Courts, their jurisdiction will be much less

1850.

ELY

v.

MOULB.

1850.

ELY

v.

MOULE.

satisfactory, and great difficulties will be thrown in the way of recovering debts there.

ALDERSON, B.—I am of the same opinion. I have great respect for the authority of the Judges who framed those rules, and cannot help thinking that in the one referred to they acted *ex majore cautela*. In the working of the Act some cases might occur in which it would be necessary to serve a judgment, and they therefore directed, that, if such a step were necessary, the judgment should be served in a given way. It was more convenient to give such a direction, than to go elaborately through the Act and see if any such case could possibly arise. If no provision had been made for it, it would have been a *casus omissus*; for, as suggested by my brother *Parke*, if an order were made *varying* a judgment already given, it might be a question whether that was a judgment or an order; so the Judges said at once, if it is to be served, it must be served in a given way. They did not mean that that should be taken as deciding affirmatively that a judgment is to be served, but only, if required to be served, that the service should be in a particular way. As to the question in general, it is a very useful rule of the superior Courts, that every suitor is bound to take notice of what passes in open Court; and although some injury may occasionally arise from the adoption of this principle, yet the general convenience greatly overbalances it.

PLATT, B.—I also think that there was no necessity whatever for serving this order; for although it is called an order, it is neither more nor less than a judgment pronounced on the hearing of the plaint. It is remarkable, that throughout the Act nothing is said about the service of any judgment; but in those cases where the service of any proceeding is required, the Act is express; as, for instance, the 59th section—"and thereupon a summons

1860.

ELY
v.
MOULE.

shall be served on the defendant " so many days before the day on which the court shall be holden at which the cause is to be tried. So, again, in proceedings to recover possession of premises by ejectment under the 122nd section; there a summons is to issue, and upon proof of service of it, the Court is authorised to issue a warrant to the bailiff to give the plaintiff possession at the end of seven and not more than ten days from the date thereof. There is no service of any order of the Court, but the warrant goes immediately to take possession of the premises, limiting the bailiff to a certain period, within which he is to do the act. But then it is said, that the defendant is not sufficiently protected, if execution can immediately issue against his goods. Not so, for by the 106th section, a protection is thrown around any person against whom execution shall issue, by giving him the opportunity, within five days, of paying the debt and saving his property, which would not be the case in the superior Courts, as the sheriff may levy and sell immediately. Then our attention has been called to the rules sanctioned by the Judges. But it should be recollected how those rules were made. Persons conversant with the practice of those courts, framed the rules, which were then laid before the Judges for their approbation. Possibly the word "judgment" may have slipped in by mistake, but, however that may be, the rule only means, that if a judgment is required to be served, that is the mode of service. Schedule D. of the Act speaks of fees payable to the high bailiff, and says, that there shall be so much for the service of a summons, an order, or a subpoena, but says nothing about the service of a judgment. Therefore, when we find that there are many orders which require to be served, it is fair to conclude, that the statute never contemplated the service of a judgment. Where is the injury sustained by the defendant? He is summoned to appear—let him come; if he does not, he must abide by the consequences. It seems to me, upon the whole, that

1850.

ELY
v.
MOYLE.

there is no pretence for saying that this judgment ought to have been served. If, indeed, the order of a county court is such as to be in the nature of a rule of Court, it must be served, but if it be a judgment it needs no service.

MARTIN, B.—I am of the same opinion. The question is, whether this is an order or a judgment. If it be a judgment, it need not be served; if it be an order in the nature of a rule of Court, it requires service. It is clear to me that it is a judgment. The real difficulty arises from inserting in the order the direction as to the mode of payment. But the word "forthwith" shews, that no time was intended to be given. What is the nature of a debt? When a debt is due, it is the duty of the debtor to pay it, and the creditor may bring an action without any demand. This was a debt the moment the judgment was given, and the law casts on the debtor the duty to pay forthwith, or execution may at once issue. It is said, that this will lead to hardship; but that will be one case in a thousand, for in nine hundred and ninety-nine no proceedings are ever taken until the debtor has had ample opportunity of discharging the debt. I therefore think, that the proceedings were quite regular, and am glad to prevent the additional expense which would be occasioned by our holding the contrary.

Rule discharged.

1850.

BROOKES v. TICHBORNE.

Dec. 16.

CASE for libel. The declaration charged the defendant with having been guilty of publishing a libel, which charged the plaintiff with having published a libel on the defendant. Plea in justification, that the plaintiff had written the libel imputed to the defendant. De injuriâ, and issue thereon.

At the trial, before *Patteson*, J., at the last Stafford Spring Assizes, the defendant's counsel, in support of the plea, and to shew that a letter which contained the alleged libel upon the defendant was written by the plaintiff, relied upon the fact that, upon several occasions, the plaintiff had been in the habit of mis-spelling the defendant's name, by improperly adding a second *t*, and by spelling it *Titchborne* instead of *Tichborne*; and for this purpose the defendant's counsel offered in evidence several letters, which he proved to have been written by the plaintiff, but which were not in evidence in the cause, in order to shew this peculiarity. This evidence was objected to on the part of the plaintiff, and was rejected by the learned Judge, who was of opinion that it was not admissible. The plaintiff having obtained a verdict, with 1*s.* damages,

In an action of libel, charging the plaintiff with having published a libel upon the defendant, to which the defendant pleads that the plaintiff did in fact publish the libel in question; letters, not otherwise evidence in the cause, written by the plaintiff, and in which the defendant's name was spelt in a peculiar manner, were held admissible as evidence that the libel in question, which contained the defendant's name spelt with the same peculiarity, was written by the plaintiff.

Allen, Serjt., obtained a rule nisi for a new trial, on the ground that these letters were improperly rejected.

In Trinity Vacation last, (June 22),

Keating and *Gray* shewed cause, and contended that the letters were not admissible in evidence, upon the same principle as comparison of handwriting, under such circumstances, is not admissible; that the proper mode of proving the peculiarity of spelling, which the plaintiff had been in the habit of adopting, was by the testimony of some witness who was cognisant of that fact. That a pe-

1850.
 {
 BROOKES
 v.
 TITCHBORNE.

culiar mode of spelling a person's name was precisely analogous to a peculiar form of handwriting; and therefore, that the admission of such evidence would have the effect of improperly making all documents alleged to be written by the party evidence in the cause. And they cited *Hughes v. Rogers* (a), *Griffiths v. Ivory* (b), and *Doe d. Perrey v. Newton* (c), in support of these propositions.

Allen, Serjt., in support of the rule, urged the admissibility of the letters, on the ground of their relevancy, and of its being one mode of proof of a fact, the propriety of the admission of that fact not being denied on the part of the plaintiff.

The Court, consisting of *Parke*, B., and *Alderson*, B., stated that they were clearly of opinion that the letters ought to have been received in evidence; but, as the ground of their decision involved a matter of some nicety, they would give a written judgment upon the question.

Cur. adv. vult.

The judgment of the Court was now delivered by

PARKE, B.—The question in this case, which was argued before us after Trinity Term last, was, whether my brother *Patteson* was right in the rejection of evidence offered on the part of the defendant.

It was an action for a libel, charging the plaintiff with having written a libel on the defendant. The defendant pleaded in justification, that the plaintiff had written the libel. In the libel alleged to have been so written, the defendant's name was spelt with two *t*'s, *Titchborne*, and not *Tichborne*. In order to shew that the plaintiff wrote that libel, my brother *Allen* proposed to shew that such was the mode in which the plaintiff spelt the defendant's name

(a) 8 M. & W. 123. (b) 11 A. & E. 322. (c) 5 A. & E. 514.

on other occasions; and for that purpose offered in evidence one or more letters, which he proposed to prove to have been written by the plaintiff, in which the name of the defendant was so spelt. Mr. *Keating*, on behalf of the plaintiff, objected to the admission of those letters, and my brother *Patteson* rejected them; and on that ground a rule nisi for a new trial was granted.

1850.
BROOKES
v.
TICHBORNE.

On shewing cause it was hardly disputed, that, if a habit of the plaintiff so to spell the word was proved, it was some evidence against the plaintiff to shew that he wrote the libel. Indeed, we think that proposition cannot be disputed, the *value* of such evidence depending on the degree of peculiarity in the mode of spelling, and the number of occasions in which the plaintiff had used it. But it was objected, that the mode of proof of that habit was improper, and that the habit should be proved, as the character of handwriting is, not by producing one or more specimens and comparing them, but by some witness who is acquainted with it from having seen the party write, or corresponded with him. But we think this is not like the case of the general style and character of handwriting. The object is not to shew similarity of the form of the letters and mode of writing of a particular word or words, but to prove a peculiar mode of spelling a word, which might be evidenced by the plaintiff having orally spelt it in a different way, or written it in that way once or oftener in any sort of characters, the more frequently the greater the value of the evidence. For that purpose, one or more specimens written by him with that peculiar orthography would be admissible.

We are of opinion, therefore, that this evidence ought to have been received, and, not having been received, the rule for a new trial must be absolute.

Rule absolute.

1850.

Dec. 16.

Trespass will not lie against the occupier of land at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or by verdict; and therefore he cannot, in such case, waive the tort, and maintain an action of use and occupation.

TURNER v. CAMERON'S COALBROOK STEAM COAL COMPANY.

DEBT for use and occupation:—Plea, never indebted, and issue thereon.

At the trial, before *Williams, J.*, at the last Spring Assizes for the county of Glamorgan, it appeared that the action was brought to recover the sum of 20*l.* for two years' rent, for a field called the Mill Field, and the further sum of 120*l.* for four years' rent for some other land adjoining the above, upon which the defendants had placed a line of railway. The rent was claimed as due up to Michaelmas, 1849. It appeared that, in the year 1840, the whole of the land had been mortgaged by the then owner, Colonel Cameron, to the plaintiff. In the year 1845, the defendants had entered into possession of that portion of the land on which the railway was; and in 1847 they erected some buildings upon the Mill Field; and they had been in the occupation of the whole of the premises up to the time of the commencement of this action. On the 12th of October, 1848, the defendants were served with a notice by the plaintiff, to pay him the rent then due, and that also which might afterwards become due in respect of the portion called the Mill Field. Subsequent to this notice, much correspondence with reference to the whole of the premises passed between the parties. The present action was commenced upon the 30th of November, 1849. The learned Judge directed the jury, that, under the circumstances of the case, the plaintiff was in point of law in a position to waive the trespass in respect of the occupation of the land by the defendants, and to maintain this action for the use and occupation of all the premises; but, entertaining some doubt whether there was evidence to entitle the plaintiff to succeed as to the whole of the land, or even as to the Mill Field, he reserved leave to the defendants to move to enter a nonsuit, or to reduce the verdict to the

sum of 10*l*., being one year's rent for the Mill Field. A verdict having been found for the plaintiff with respect to the whole land,

1850.
TURNER
v.
CAMERON'S
COALBROOK
STREAM COAL
Co.

Benson, in last Term, moved for a rule nisi, in pursuance of the leave reserved, to enter a nonsuit or to reduce the damages. The Court refused so much of the rule as related to the entry of a nonsuit, being of opinion that there was sufficient evidence to entitle the plaintiff to recover the year's rent for the Mill Field, but granted a rule nisi to reduce the damages.

In the present Sittings, (December 3),

Davison and *Grove* shewed cause.—The plaintiff is entitled to maintain this action for the recovery of the rent due to him by the defendants, by reason of their occupation of that portion of the land upon which the railway was placed. [*Parke*, B.—Shew us in the first place that Colonel Cameron was in a position to recover rent from the defendants before the notice of mortgage was given to the defendants.]—It was here contended that the evidence supported such a contract between Colonel Cameron and the defendants.—Upon the notice being given, the defendants became liable to the rent of the premises they had occupied. They were mere trespassers,—the plaintiff was legally entitled both to the land and to the rent. His title was not disputed. *Evans v. Elliott* (a) will no doubt be relied upon by the defendants; but that case is not consistent with several authorities upon this question. In *Pope v. Biggs* (b) it was held that a mortgagee, upon giving notice to the tenant holding the mortgaged premises under a lease granted by the mortgagor after the mortgage, is entitled to receive from those tenants the rents actually due at the time of the notice, as well as those which accrued due afterwards. *Bayley*, J.,

(a) 9 A. & E. 342.

(b) 9 B. & C. 245.

1850.

TURNER

v.

CAMERON'S
COALBROOK
STREAM COAL
Co.

there says, "I have no doubt that, in point of law, a tenant who comes into possession under a demise from a mortgagor, after a mortgage executed by him, may consider the mortgagor his landlord so long as the mortgagee allows the mortgagor to continue in possession and receive the rents; and that payment of the rents by the tenant to the mortgagor, without any notice of the mortgage, is a valid payment. But the mortgagee, by giving notice of the mortgage to the tenant, may thereby make him his tenant, and entitle himself to receive the rents." [*Parke, B.*—I do not think that the case itself supports your position, although the dictum of Mr. Justice *Bayley* is in your favour. But that is all, for the case merely decides, and no doubt correctly, that the tenant, upon an eviction by title paramount, is entitled to dispute the mortgagor's title to the land.] *Lumley v. Hodgson* (a) decided that an action for use and occupation is maintainable by the mortgagee for rent due after notice given to the tenant, without attornment; and it would seem that the effect of such notice is the same as to the by-gone rent as it is as to the after-accruing rent. *Birch v. Wright* (b) is also in the plaintiff's favour. [*Martin, B.*—*Standen v. Christmas* (c) is against you; for in one of the points made in that case, which appears to have involved a similar question, the Court of Queen's Bench seem to rest the action for use and occupation upon a contract between the parties, the count for use and occupation stating, as the Court there say, that the defendant occupied by the *sufferance and permission* of the plaintiff.] So here, as the owner could have ejected the defendants but did not do so, they held the land by his permission. The notice determines the mortgagor's right, and entitles the mortgagee to the rent: *Waddilove v. Barnett* (d). [*Martin, B.*—So that, if the tenant had held the premises at a pepper-

(a) 16 East, 99.

(b) 1 T. R. 378.

(c) 10 Q. B. 135.

(d) 2 Bing. N. C. 538.

corn rent, the mortgagee might say, "pay me the real value of the land." In *The Mayor &c. of Newport v. Saunders* (a), it was held that assumpsit may be maintained by the owner of a market for stallage, without shewing any contract in fact between him and the occupier of the stall. [*Martin*, B., I have good reasons for knowing that the case was not very strongly pressed upon the Court, and that the question in dispute would not have been set at rest by that decision, if the parties had felt it their interest to have the matter discussed in a higher Court.] They also referred to *Moss v. Gallimore* (b), *Johnson v. Jones* (c), *Hull v. Vaughan* (d), *Gibson v. Kirk* (e), *Doe d. Higginbotham v. Barton* (f), *Kirtland v. Pounsett* (g), *Partington v. Woodcock* (h), *Foster v. Stewart* (i), and to the notes to *Moss v. Gallimore* (k); and *Parke*, B., referred to *Burrowes v. Gradin* (l), and *Howard v. Shaw* (m).

1850.
TURNER
v.
CAMERON'S
COALBROOK
STEAM COAL
CO.

Benson in support of the rule.—Even upon the assumption that the mortgagor could have maintained an action for use and occupation against the defendants, that contract has not been transferred to the plaintiff. All the authorities shew that, in order to make the tenant liable to the mortgagee for either by-gone or after-accruing rent, there must be a contract between the parties, by which the tenant undertakes to pay the mortgagee the rent. It has been said that the mortgagee may waive the tort and sue upon the contract; but in order to sustain the action a contract must be established. Thus the count for use and occupation always states that the defendant held the premises by the *permission* and *sufferance* of the plain-

- (a) 3 B. & Ad. 411.
- (b) Dougl. 279.
- (c) 9 A. & E. 809.
- (d) 6 Price, 157.
- (e) 1 Q. B. 858.
- (f) 11 A. & E. 307.

- (g) 2 Taunt. 145.
- (h) 6 A. & E. 690.
- (i) 3 M. & S. 191.
- (k) 1 Smith, L. C. 310.
- (l) 1 D. & L. P. C. 213.
- (m) 8 M. & W. 118.

1850.
 TURNER
 v.
 CAMERON'S
 COALBROOK
 STEAM COAL
 Co.

tiff. This allegation is a material one, and is put in issue by the plea which denies the contract: *Waddilove v. Barnett*. That case indeed shews that there is a new contract, which dates from the time the notice is given. The mortgagor is not the mortgagee's agent for the purpose of making the contract. If such a contract were to be implied, the mortgagee, after remaining silent for several years, might unexpectedly give the occupier of the land notice to pay him all arrears. To hold the tenant liable upon such terms, would be to fix a contract upon parties between whom there is no privity whatever. The cases of *Evans v. Elliott*, and *Browne v. Storey (a)*, are express authorities that the mere notice is not sufficient, but that a distinct contract must be shewn to exist between the occupier of the land and the mortgagee.

Cur. adv. vult.

PARKE, B., now said—This was an action which was brought by the mortgagee for use and occupation, against a Company which had been established by the defendants, and which was, I believe, a corporate body. The action was for the use and occupation of one part of the land which was occupied by the railroad, and for another part which is called the Mill Field. The cause was tried before my brother *Williams*, when a verdict was found for the plaintiff; but the learned Judge, doubting whether there was sufficient evidence to go to the jury with respect to the whole or any part, reserved leave to the defendants' counsel to move either to enter a nonsuit, or to reduce the damages, as the Court should be of opinion that there was no evidence to sustain the action either as to the whole or a portion of the premises. The Court was of opinion, on the motion for a rule to shew cause, that there was ample evidence to sustain it with respect to that part called the Mill Field; but doubting as to the remainder, they granted a rule to shew

(a) 1 Man. & Gr. 117.

cause as to the reduction of the damages only. On shewing cause, it appeared that there was some evidence to go to the jury of the defendants having occupied this part of the land by permission of the plaintiff. Colonel Cameron was the proprietor of the property, and mortgaged it to the plaintiff Turner. After the mortgage, the Cameron's Company was established, and by some agreement or understanding with him, or in what other way does not appear by the evidence, the Coal Company occupied the land by laying their rails upon it. It appears that afterwards, when they were called upon for compensation, there was a negotiation between the plaintiff and the defendants for the payment of compensation for the whole. That is evidence to go to the jury, that the defendants had held the land upon the terms that they were to pay for it to the mortgagee, but it was not more than evidence to go to the jury; and if my brother *Williams* had left that question to the jury, there would have been no ground to disturb the verdict. But it appears, on the admission of the learned counsel on both sides, that, in leaving the case to the jury, my brother *Williams* told them, that the plaintiff was in a condition to, and by law might, waive the action of trespass, which he was entitled to bring for the occupation of the land by the Railway Company, and to bring an action for use and occupation instead. That, I think, upon the cases may be considered to be a doubtful question. Supposing the plaintiff to be simply in the situation of a person in possession, and the defendants to have trespassed on the land, and to have occupied that land to his exclusion for some time, whether that would have been a ground to recover for use and occupation, on the principle that the plaintiff might waive the trespass and recover in assumpsit, is a matter which may be treated as somewhat doubtful. But in this case, we are all clearly of opinion, that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of

1850.
 TURNER
 v.
 CAMERON'S
 COALBROOK
 STEAM COAL
 CO.

1850.
 TURNER
 v.
 CAMERON'S
 COALBROOK
 STEAM COAL
 Co.

tiff. This allegation is a material one, and is put in issue by the plea which denies the contract: *Waddilove v. Barnett*. That case indeed shews that there is a new contract, which dates from the time the notice is given. The mortgagor is not the mortgagee's agent for the purpose of making the contract. If such a contract were to be implied, the mortgagee, after remaining silent for several years, might unexpectedly give the occupier of the land notice to pay him all arrears. To hold the tenant liable upon such terms, would be to fix a contract upon parties between whom there is no privity whatever. The cases of *Evans v. Elliott*, and *Broune v. Storey (a)*, are express authorities that the mere notice is not sufficient, but that a distinct contract must be shewn to exist between the occupier of the land and the mortgagee.

Cur. adv. vult.

PARKE, B., now said—This was an action which was brought by the mortgagee for use and occupation, against a Company which had been established by the defendants, and which was, I believe, a corporate body. The action was for the use and occupation of one part of the land which was occupied by the railroad, and for another part which is called the Mill Field. The cause was tried before my brother *Williams*, when a verdict was found for the plaintiff; but the learned Judge, doubting whether there was sufficient evidence to go to the jury with respect to the whole or any part, reserved leave to the defendants' counsel to move either to enter a nonsuit, or to reduce the damages, as the Court should be of opinion that there was no evidence to sustain the action either as to the whole or a portion of the premises. The Court was of opinion, on the motion for a rule to shew cause, that there was ample evidence to sustain it with respect to that part called the Mill Field; but doubting as to the remainder, they granted a rule to shew

(a) 1 Man. & Gr. 117.

cause as to the reduction of the damages only. On shewing cause, it appeared that there was some evidence to go to the jury of the defendants having occupied this part of the land by permission of the plaintiff. Colonel Cameron was the proprietor of the property, and mortgaged it to the plaintiff Turner. After the mortgage, the Cameron's Company was established, and by some agreement or understanding with him, or in what other way does not appear by the evidence, the Coal Company occupied the land by laying their rails upon it. It appears that afterwards, when they were called upon for compensation, there was a negotiation between the plaintiff and the defendants for the payment of compensation for the whole. That is evidence to go to the jury, that the defendants had held the land upon the terms that they were to pay for it to the mortgagee, but it was not more than evidence to go to the jury; and if my brother *Williams* had left that question to the jury, there would have been no ground to disturb the verdict. But it appears, on the admission of the learned counsel on both sides, that, in leaving the case to the jury, my brother *Williams* told them, that the plaintiff was in a condition to, and by law might, waive the action of trespass, which he was entitled to bring for the occupation of the land by the Railway Company, and to bring an action for use and occupation instead. That, I think, upon the cases may be considered to be a doubtful question. Supposing the plaintiff to be simply in the situation of a person in possession, and the defendants to have trespassed on the land, and to have occupied that land to his exclusion for some time, whether that would have been a ground to recover for use and occupation, on the principle that the plaintiff might waive the trespass and recover in assumpsit, is a matter which may be treated as somewhat doubtful. But in this case, we are all clearly of opinion, that the plaintiff was not in a condition to bring an action of trespass, inasmuch as he was mortgagee out of

1850.
 TURNER
 v.
 CAMERON'S
 COALBROOK
 STEAM COAL
 CO.

1850.
 LITCHFIELD
 v.
 READY.

ejectment mentioned to the lessor of the plaintiff on his assent; and that, on default, the lessor of the plaintiff shall be at liberty to sign final judgment, and to issue execution against the said Henry Ready for the amount of the costs of such judgment, execution, writ of possession, sheriff's poundage, officer's fees, and all other incidental expenses.

"Dated the 31st of October, 1849."

On the 15th of November the defendant gave up possession of the premises to the plaintiff, who entered upon them.

Upon these facts the defendant's counsel contended, that the action would not lie. A verdict was thereupon entered for the plaintiff, leave being reserved to the defendant to move to enter a nonsuit.

Aspland having obtained a rule nisi accordingly,

Phinn now shewed cause.—The plaintiff is entitled to retain the verdict, if he succeeds in establishing either one of the two following propositions; namely, either, first, that the entry, which took place upon the 15th of November, 1849, related back to the time when the plaintiff's title to the property accrued, and so vested the possession in him at the earlier period; or, secondly, if the plaintiff shew that the Judge's order obtained by the defendant is evidence that he has admitted the plaintiff's title and possession, and consequently that it has an effect of a similar character to that of a judgment by default in an action of ejectment. With respect to the first point, it is submitted that a mortgagor, who continues in possession of the premises after a mortgage in fee to the mortgagee, is the mere agent or bailiff of the latter. [*Parke*, B.—You will have to contend, that the mortgagee can maintain an action of trespass in all cases where he could bring ejectment.] It

1850.
 LITCHFIELD
 v.
 READY.

would seem so. In former times the action of ejectment was in fact an action for damages, and the measure of the damages was, the profits of the land accruing during the time the defendant had held the land. The effect of the action of ejectment is merely to connect the owner of the land with the possession. The entry, by the doctrine of relation, vests the possession. It is thus laid down in Buller's N. P. (a), "In case the plaintiff can prove his title accrued before the time of the demise, and prove the defendant to have been longer in possession, he shall recover antecedent profits; but in such case the defendant will be at liberty to controvert the title, which he cannot do in case the plaintiff do not go for more time than is contained in the demise; because being tenant in possession, he must have been served with the declaration, and therefore the record is against him conclusive evidence of the title; but against a precedent occupier the record is no evidence, and therefore against such a one it is necessary for the plaintiff to prove his title, and also to prove an actual entry; for trespass, being a possessory action, cannot be maintained without it." And then the learned author goes on to say: "But it may admit of doubt what proof of an actual entry is sufficient. It has been said that the plaintiff will be entitled to recover the mesne profits only from the time he can prove himself to have been in actual possession. . . . Others have holden that when once he has made an actual entry, that would have relation to the time his title accrued, so as to entitle him to recover the mesne profits from that time." That applies to the present case. In the recent case of *Tharpe v. Stallwood* (b) where the doctrine of relation was discussed, Coltman, J., in the course of the argument, said: "After a verdict for the plaintiff in ejectment, the lessor of the plaintiff may maintain an action for mesne profits ante-

(a) 87 a.

(b) 5 M. & G. 760.

1850.
 LITCHFIELD
 v.
 READY.

cedent to the day of the demise; how is that explained except upon the doctrine of relation?" And in giving his judgment in the same case the learned Judge says: "when the rule was first moved for, it occurred to me to ask how it was that a successful lessor of the plaintiff in ejectment could maintain trespass for mesne profits antecedent to the day of demise, as he had no right of action at the time the alleged trespass was committed. It appeared to me that in that case the defendant was not made a wrong doer by relation, but was shewn to have been one at the time the profits accrued. To that question I received no answer, except that ejectment was a peculiar action. But the rule is the same as obtained in the old action of trespass for disseisin, where the disseisee, upon recovering possession, might maintain an action for the profits accruing in the intervening period." Here the defendant is a mere wrong doer, who enjoys the possession of the land after the mortgage, either as tenant to or by the sufferance and permission of the mortgagee. [*Parke, B.*—The question as to the effect of a judgment in ejectment was much discussed in the case of *Doe v. Wright (a)*, where the several authorities upon the subject are collected.] The same point also came before this Court in *Doe v. Wellman (b)*. The mortgagor in truth is the mere bailiff of the mortgagee to receive the rent. [*Parke, B.*—If you can establish that proposition, your argument may be successful.] This very point arose in *Keech v. Hall (c)*, where it was decided that a mortgagee might recover in ejectment, without a previous notice to quit, against a tenant claiming under a lease from the mortgagor, granted after the mortgage without the privity of the mortgagee. It was there asked by the defendant's counsel whether such mortgagee might also maintain an action against the tenant for mesne profits, which would be a manifest hardship and injustice to the

(a) 10 A. & E. 763.

(b) 2 Exch. 368.

(c) Dougl. 21.

1850.
 LITCHFIELD
 v.
 READY.

tenant, as he would then pay the rent twice. Lord *Mansfield*, C. J., gave no opinion on the point, but said, there might be a distinction; for the mortgagor might be considered as receiving the rent in order to pay the interest, by an implied authority from the mortgagee, until he determined his will. [*Parke*, B.—I think the authorities are against your proposition.] *Wheeler v. Montefiore* (a) may seem to be so, but that proceeded on the ground that a *lessee* before entry cannot maintain trespass; and the doctrine of relation by entry was not discussed, for there was no entry. Here the plaintiff is mortgagee in fee, and has entered. [*Parke*, B.—The doctrine of relation applies only to the case of disseisor and disseisee. See Com. Dig. Trespass (B. 3.), Cro. Jac. 604, *Perry v. Bowes* (b).] In a note to *Butcher v. Butcher* (c), which may be quoted to shew what was the general opinion as to the law upon this point at that time, it is said, "Ejectment is founded upon a right to enter and make the demise to the nominal-lessee; whoever therefore can maintain ejectment, may enter peaceably without action, and upon such entry the legal possession vests, with relation to the period at which the title of the party accrued, so that he may now sue for the mesne trespasses; which brings the right of possession and the lawfulness of the entry directly in question."

In the second place, the Judge's order which the defendant has given is, in effect, equivalent to a judgment by default in an action of ejectment, which is evidence of the plaintiff's title and possession from the date of the demise laid in the declaration in the ejectment brought to recover the possession of these premises: *Aslin v. Parkin* (d). This order is as much evidence of the plaintiff's title and of his right of entry, by the confession of the defendant, as is a judgment in ejectment, unless there be some magic in

(a) 2 Q. B. 133.

(b) Vent. 361.

(c) 1 Man. & Ry. 221.

(d) 2 Burr. 665.

1850.
 LITCHFIELD
 v.
 READY.

the mere fact of signing judgment. In *Hunter v. Britts*(a), Lord *Ellenborough*, C. J., thought, that the judgment in ejectment was not evidence of title against the defendant without notice of the ejectment; but that his subsequent promise amounted to an admission, that the plaintiff was entitled to the possession of the premises, and that he himself was a trespasser. *Calvert v. Horsfall* (b), is also to the same effect.

Aspland, contra, was not called upon.

PARKE, B.—I am of opinion that the rule ought to be absolute. There are two questions submitted for our consideration in this case. The first is, whether the plaintiff, who is the mortgagee of the premises in question, but who was not in actual possession until the 15th of November, 1849, can maintain an action of trespass for meane profits antecedent to that date. And the second question is, whether the Judge's order given by the defendant amounts to an agreement on his part to put himself in the situation of one against whom judgment in ejectment has been recovered. As to the first point, the question is, whether the entry by the plaintiff at the later date creates a prior possession, by relation back to the date of the mortgage deed, the plaintiff not having been in actual possession at that time. The general doctrine is, that where a man is disseised and re-enters, such re-entry refers to and has relation back to the time of his first entry, and he may bring an action of meane profits, and recover them from the date of the prior entry; for there he was in actual possession at the time the trespass was committed. But that rule applies only to cases of disseisin, as appears by the books; and the several authorities upon the subject are to be found collected in 2 Roll. Abr. tit. "Trespass per Relation," p. 554, and those are all cases of that description. Indeed,

(a) 3 Camp. 454.

(b) 4 Esp. 167.

it is common learning, that an action of trespass cannot be maintained without an actual possession by entry on the land. And the better opinion seems to be, that on a conveyance under the Statute of Uses, the party to whom the land is conveyed has no right to bring an action of trespass until after entry. In the present case, there is no relation back to the title of the mortgagee. In an action for mesne profits it is said that the record of a judgment in ejectment is conclusive evidence of the plaintiff's title, unless he waives his right of replying it by way of estoppel, when he has an opportunity of placing it on the record, but fails to do so. This matter was much discussed in *Doe v. Wellsman*, where the estoppel was replied; but in *Armstrong v. Norton* (a), decided in the Court of Exchequer in Ireland, the estoppel was not replied. The Court there held, that the judgment was not more than *prima facie* evidence of the plaintiff's title; but as the New Rules have not been introduced into those Courts, the defendant is at liberty to enter fully into his defence under the general traverse of not guilty, and the matter is at large, and the plaintiff has no opportunity of replying the estoppel. In *Doe v. Huddart* (b), it was held, that as the defendant afforded the plaintiff an opportunity of relying on the estoppel by way of replication, of which he did not avail himself, the evidence was not conclusive. The rule is thus laid down in *Treviban v. Laurence* (c):—"Where the plaintiff's title is by estoppel, and the defendant pleads the general issue, the jury are bound by the estoppel; for here is a title in the plaintiff that is a good title in law, and a good title if the matter had been disclosed and relied on in pleading; but if the defendant pleads the special matter, and the plaintiff will not rely on the estoppel when he may, but takes issue on the fact, the jury shall not be bound by the estoppel, for then they are to find the truth

1850.
 LITCHFIELD
 &
 READY.

(a) 2 Irish L. Rep. 96.

(b) 2 Cr. M. & R. 316.

(c) 2 Ld. Raym. 1048; 1 Salk.
276.

1880.
LITCHFIELD
v.
READY.

of the fact, which is against him." The cases shew, that the record in ejectment is evidence of the plaintiff's possession of the premises at the time of the demise, and therefore that, on the production of the record, the plaintiff may become entitled to recover mesne profits subsequent to the date of the demise in the declaration in ejectment. But it appears from the authorities, that if the plaintiff seeks to recover mesne profits antecedently to the day of the demise in the declaration in ejectment, he must go further, and is bound to prove such a title, accompanied by possession, as would enable him to maintain an ordinary action of trespass. The learned counsel has relied upon two passages which he has cited from the case of *Tharpe v. Stallwood*, in which he states that my late lamented brother *Coltman* expressed an opinion which favours his argument in support of the doctrine of relation. No one can entertain a higher respect for the opinion of that learned judge than I do; but I do not think the passages referred to lead to the inference sought to be deduced from them. It appears to me, that he did not intend to say that the entry made the party a trespasser by relation in all cases to the time when the owner's title accrued, but only in the case of disseisor and disseisee, where the disseisee by the subsequent entry is remitted to his original rights, and is to be considered as having been in actual possession at the time he was put out, so as not only to give him a good title and right of entry, but such a title as is sufficient to maintain the action of trespass to recover damages for the time he had been ousted. In the present case, therefore, the plaintiff, in order to succeed, is bound to establish a title accompanied by the possession of the property with respect to which the action is brought. Here the mortgagee never was in possession until the 15th of November, 1849; and I therefore think that, upon this state of facts, irrespective of the order which the plaintiff has obtained from the defendant, he is not in a

position to maintain an action of trespass for mesne profits prior to that date.

1850.
LITCHFIELD
v.
READY.

The other question in the case is, whether the agreement by the Judge's order has the same effect as a recovery by judgment in ejectment. It is in effect totally different; the only matter in dispute at the time being, whether the defendant was to give up possession of the premises without being liable to the costs of signing judgment in ejectment and of the execution. There is no plea of accord and satisfaction, and therefore it is not necessary to give any opinion upon the effect of the agreement as an answer to the action; for the only issue upon which the present question depends is that which is a denial that the close in which the trespass was committed was at that time the close of the plaintiff. Now the meaning of this plea has been settled by the case of *Jones v. Chapman* (a). Here the plaintiff's title to the property is not disputed, the only question being whether he had such a possession of the property at the time as is sufficient to maintain this action; and I am of opinion that the bare fact that he is the mortgagee, to which the case is now reduced, is not of itself sufficient.

ALDERSON, B., PLATT, B., and MARTIN, B., concurred.

Rule absolute (b).

(a) 2 Exch. 803.

(b) See the last case.

1850.

Dec. 5.

MILNES v. DAWSON.

To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded, that the drawer indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held the same without value or consideration; and that, after the bill became due, the drawer accepted certain scrip certificates from the defendant, in full satisfaction and discharge of the bill. Replication, that the bill was indorsed for a good and sufficient consideration. Issue thereon: —*Held*, after verdict, that the plea was bad, and that the plaintiff was entitled to judgment non obstante veredicto.

ASSUMPSIT on a bill of exchange for 45*l.* 19*s.*, payable three months after date, drawn by one James Hanson upon and accepted by the defendant, and indorsed by Hanson to the plaintiff.—The fifth plea stated, that there never was any value or consideration whatever for the indorsement of the bill by the said J. Hanson to the plaintiff, and that the plaintiff took and received and hath always held the same without any value or consideration for the same; and that after the bill became due and payable according to the tenor thereof, and before the commencement of the suit, the said J. Hanson, with the assent and concurrence of the defendant, took and appropriated certain scrip certificates and certificates of shares, of and belonging to the defendant, in divers railway companies and of great value, to wit, of a value far exceeding the amount of the said bill and of all interest thereon, and of all damages by reason of the non-payment thereof, and which certificates had been before then deposited with him the said J. Hanson as a security for the payment of the money secured and made payable by the said bill, in full satisfaction and discharge of the said bill, interest, and damages.—Verification. Replication, that the said bill was indorsed by the said J. Hanson to the plaintiff, as in the declaration mentioned, for a good and sufficient consideration, to wit, to the full amount of the said bill; concluding to the country: upon which issue was joined. There was another plea, which raised a similar issue.

At the trial, before *Parke*, B., at the London Sittings in last Trinity Term, the issues raised by the three first pleas were found in favour of the plaintiff, and the jury were discharged as to the fourth; but the issues raised by the fifth and last plea were found for the defendant.

J. Brown, in Michaelmas Term, obtained a rule nisi to

enter judgment non obstante veredicto upon the fifth and last pleas.

1850.

MILNES
v.
DAWSON.

Hoggins shewed cause.—^aThe plea is a good answer to the action after verdict. The plaintiff never having given any value or consideration for the bill, and it being overdue, the executed agreement between Hanson and the defendant precludes the plaintiff from recovering the amount of the bill from the defendant. [*Parke, B.*—Hanson transfers the bill to the plaintiff, who thereupon becomes the holder, and the right to sue upon it is vested in him. It does not appear that the bill was indorsed after it became due. That being so, what possible right can Hanson have to receive the amount of the bill?] In point of law, the plaintiff was the mere agent of Hanson to receive the money; a settlement therefore with Hanson is a discharge of the bill. In case the plaintiff had received the amount of the bill, it would have been his duty to account for it with Hanson, who could have enforced such right against him by an action for money had and received, or perhaps by treating it as a loan. [*Parke, B.*—Suppose the bill was given to the plaintiff; the only issue is, whether the plaintiff gave a good and valuable consideration for it. Suppose the plea had alleged that the bill was handed over to the plaintiff as trustee, would it have been a good plea? *Alderson, B.*—The argument in truth proceeds upon the assumption that the bill never was transferred to the plaintiff.] It is submitted that the plaintiff was merely Hanson's agent, and had only a naked authority from him to sue upon the bill with that object.

J. Brown, contra, was not called upon.

PARKE, B.—I am of opinion that this rule ought to be absolute. The fifth and last pleas, which are in substance the same, state, that Hanson indorsed the bill to the plain-

1850.
MILNES
v.
DAWSON.

tiff without any consideration or value, and that the plaintiff never gave any consideration or value for it; and that after it became due Hanson and the defendant entered into an agreement, by which the former accepted certain scrip in discharge and satisfaction of the bill. It would be altogether inconsistent with the negotiability of these instruments, to hold, that after the indorser has transferred the property in the instrument, he may, by receiving the amount of it, affect the right of his indorsee. When the property in the bill is passed, the right to sue upon the bill follows also. The question, whether Hanson could sue the plaintiff, we are not now called upon to determine. If it had been averred that the plaintiff held the bill as his agent, I should not have much difficulty in saying that the action would lie. A bill of exchange is a chattel, and the gift is complete by delivery coupled with the intention to give. If the question as to the rights between donor and donee were now discussed, with reference to the state of the law on the subject as it stood towards the close of the last century, we might hold otherwise than we now do. It has been said, that the donee of a bill of exchange cannot sue the donor upon it, as the donor may well allege that the donee did not give any consideration for it. See *Holliday v. Atkinson* (a), and Mr. Chitty's work on Bills of Exchange, where the cases are to be found collected at page 74. And therefore it may be said, that if this bill was a gift from Hanson, the plaintiff could not have sued him upon it; but still Hanson transferred all his rights to the plaintiff; and how, therefore, can it be contended that a payment to the donor is to be taken as a satisfaction of a bill in the hands of the donee? The learned counsel contends, that it is to be presumed that the indorsement took place after the bill had become due and payable. But we are not at liberty to draw any such inference; and it is perfectly consistent with everything that is stated in this plea, that

the full title in the bill was transferred to the plaintiff. If the plea had alleged that the plaintiff held the bill as Hanson's agent, merely for the purpose of receiving the money for him, then a payment to either party would have been a good discharge of the party liable upon the bill, and the plea would have been good; but in truth the plea does not contain any such averment, and consequently it cannot be sustained.

1860.
MILNES
v.
DAWSON.

ALDERSON, B.—I am of the same opinion. It is not necessary to say whether Hanson could maintain an action for the recovery of this amount from the plaintiff. But by the indorsement he has transferred to the plaintiff all the rights which, before the indorsement, he had of suing upon the bill. If therefore he has parted with all his rights, and that of suing on the bill, and the plaintiff has them, how is it possible to say that a payment to Hanson, who has not the bill, is a due payment to the plaintiff, who has it?

PLATT, B., and MARTIN, B., concurred.

Rule absolute.

1850.

Dec. 5.

HUMPHREYS v. JONES and PICKERING.

A. and B. having entered into a joint agreement with a Railway Company to execute a contract, called "The Morley contract," for the construction of a tunnel upon the line, A. assigned all his right and interest in the contract to B., and the latter agreed to pay A. a given sum "on the completion of the said contract." After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B. by agreement with the Company, abandoned the contract, and another was entered into between the Company and other persons, under which the tunnel, at the altered level, was completed. — *Held*, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A.

ASSUMPSIT.—The declaration, after reciting that the plaintiff and the defendants had entered into a certain contract, called "The Morley Contract," with the Leeds, Dewsbury, and Manchester Railway Company, for the execution of certain works for a certain sum, stated, that by an agreement entered into between the plaintiff and the defendants, in consideration (*inter alia*) that the plaintiff would relinquish and give up to the defendants all his right and interest in the said contract, and execute such deed of assignment as should be necessary, the defendants thereby then agreed to pay to the plaintiff the sum of 2438*l.* 8*s.* 6*d.* in manner following, namely, 1938*l.* 8*s.* 6*d.* on the 18th of December, 1845, and the remaining sum of 500*l.* *on the completion of the said contract.* The declaration, after containing an averment of mutual promises and performance by the plaintiff of his part of the agreement, concluded by averring, that although the said contract was, before the commencement of the suit, to wit, *&c. completed*, and although the defendants had paid 1938*l.* 8*s.* 6*d.*, according to the agreement, yet they had not paid the residue.

The defendants severed in their defence. The defendant Pickering pleaded, *inter alia*, that the said contract was not completed *modo et forma*; upon which issue was joined.

At the trial, before *Parke*, B., at the last Cheshire Summer Assizes, it appeared that the Morley contract included the construction of a tunnel upon the line of railway; and that, after the plaintiff and defendants had entered into that contract with the Company, and after the mak-

the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A.

1860.
 HUMPHREYS
 v.
 JONES.

ing of the agreement upon which the present action was brought, the levels of the line of railway were altered, and the Morley contract was given up by agreement between the Railway Company and the defendants, and a tunnel was executed by other persons, at a cost of 200,000*l.*, of which 180,000*l.* was to be paid in the course of the work, and the farther sum of 10,000*l.* upon the completion of the tunnel, and 10,000*l.* was to be retained until the expiration of a year after the completion of the tunnel, during which period the contractors were to maintain it in repair. This action was commenced before the expiration of this period of a year, but after the tunnel had been finished and the line opened for traffic. It was objected, on the part of the defendant, that the plaintiff was not entitled to recover in this action; and the learned Judge being of that opinion, a verdict was entered for the defendant upon the above issue, leave being reserved to the plaintiff to move to enter a verdict for him on that issue.

In Michaelmas Term last, *Welsby* obtained a rule accordingly.

Chilton and *Davison* now shewed cause, and contended that the defendant was entitled to retain the verdict entered for him, inasmuch as the "Morley contract" was the contract prior to the completion of which the plaintiff had no right of action for the amount now sought to be recovered; that the Morley contract had been abandoned, and that the new contract could not, for the purposes of the present action, be considered as the same thing as the original contract; and moreover, upon the assumption that the new contract could be considered as taking the place of the old one, the action was premature, as the twelve months, during which the works were to be maintained in repair, and during which, therefore, the contract continued to subsist, had not expired.

1850.
HUMPHREYS
v.
JONES.

Walsby, in support of the rule, urged that when the agreement between the plaintiff and the defendants, and the subject matter of it, were fairly taken into consideration, the reasonable construction to be put upon that agreement was, that the *works* which formed the subject of the original contract with the Company should be completed; that, in effect, the new contract entered into with the Company had carried out the objects of the *Morley* contract; and that the word "completed" might be understood as referring to the actual completion of that undertaking, which the plaintiff and the defendants had originally agreed to complete. And secondly, that the contract was completed when the works were finished and the railway was in use, although a portion of the sum to be paid was not, for the protection of the Company, actually payable until afterwards.

ALDERSON, B.—You ask us to put a forced construction upon the agreement between the plaintiff and the defendants, by giving a fanciful meaning to the word "completed." The event expressly provided for by the parties has never happened. We might work injustice to the other side by holding that the original contract is completed by the completion of the one which has been substituted in its place.

PLATT, B., concurred.

PARKE, B.—The agreement requires the completion of the *Morley* contract. That contract never was completed, for it was abandoned by the contractors.

Rule discharged.

1850.

PELL v. DAUBENY.

Dec. 6.

DEBT for work and labour, journeys, and attendances by the plaintiff as a witness, and for money paid.—Plea, never indebted. Issue thereon.

At the trial, before *Platt*, B., at the Northamptonshire Summer Assizes, it appeared that the action was brought to recover the sum of 46*l.* 14*s.*, for the attendance, journeys, and expenses incurred by the plaintiff in attending the trial of a cause at Westminster, under a subpoena duces tecum on behalf of the present defendant, the then plaintiff in a case of *Daubeny v. Phipps*. The claim of the present plaintiff was for 2*l.* 2*s.* per diem during his attendance at the trial, 1*l.* 1*s.* for his expenses, and 1*s.* 3*d.* per mile for his travelling expenses. He had received 5*l.* at the time of the subpoena being served upon him, and did not at that time make any further demand. The defendant's case was, that the plaintiff had not given his attendance in the character of a witness during the whole of the time in respect of which he claimed to recover; but no objection was taken to the plaintiff's case, on the ground that a witness who is subpoenaed is not entitled to a remuneration for his expenses. The learned Judge directed the jury, that if the plaintiff came to town as a witness, he would be entitled to receive his expenses; and he left it to them to decide whether the plaintiff had attended in town for as long a period as he claimed to be paid for. The jury found a verdict for the plaintiff for 19*l.* 19*s.* in respect of his expenses, excluding any compensation for loss of time.

A witness who, in obedience to a subpoena, attends a trial in a civil action, may, without any express contract, maintain an action for his expenses against the party who subpoenaed him, the fact of his attendance being evidence from which the jury may infer a contract.

Whitehurst having obtained a rule nisi for a new trial, on the ground of misdirection, and also of the verdict being against the evidence.

Macaulay, *Mellor*, and *Field* shewed cause.—In the first

1860.
 {
 PELL
 v.
 DAUBNEY.

place, the defendant cannot at this period avail himself of the proposed objection to the ruling of the learned Judge, for no point was made at the trial on his behalf, that an implied contract did not exist between the plaintiff and the defendant, that the former was to have his expenses reimbursed; the only question raised was, whether the plaintiff attended the trial as a witness on his subpoena, or in some other character. What *Tindal*, C. J., in *Jones v. Brown* (a), says with reference to this point, is strongly in the plaintiff's favour: "I think that the plaintiff, having omitted to contest the defendant's title at the proper season, cannot now object that it was not supported by evidence at the trial." But assuming the objection to be open to the defendant, the authorities shew, that a party who attends as a witness upon his subpoena, is entitled to receive repayment of his expenses from some one. In *Robins v. Bridge* (b), the question was, whether the attorney in the action, by whom the party had been subpoenaed, was liable. That proceeded on the ground, that the attorney is a mere agent, and therefore as such not liable. In *Collins v. Godefroy* (c), the action was brought to recover remuneration for loss of time. So also in *Willis v. Peckham* (d), it was held, that a witness could not recover for loss of time, although he had been expressly promised that he should receive compensation; but *Dallas*, C. J., there says, that "there were in fact no expenses." *Hallet v. Mears* (e) is an express authority, that the expenses are recoverable against the party by whom the witness is subpoenaed. There may be good grounds for saying, that if the witness is put to no expense whatever, he is bound by a kind of social duty to afford his time in giving evidence; but it would be a harsh rule to establish, that a witness is not to

(a) 1 Bing. N. C. 484.

(b) 3 M. & W. 114.

(c) 1 B. & Ad. 950.

(d) 1 Bro. & B. 515.

(e) 13 East, 15.

be reimbursed, unless, at the time of the service of the subpoena, he expressly applies for his expenses. He may not, and in most cases will not, have any sure means of ascertaining their probable amount. A witness who is served with a subpoena is bound to attend: *Goodwin v. West* (a), *Amev v. Long* (b); and if he does so, his attendance is a sufficient consideration to support a promise to pay his expenses: *Bentall v. Sydney* (c). The legislature has created a duty to pay these expenses by statute, 5 Eliz. c. 9, s. 11, which was only in affirmance of the common law. It is a condition precedent to an attachment against a witness for not attending pursuant to his subpoena, that his expenses should have been tendered him. The books of precedents contain counts in a form similar to the present.

1850.
PELL
v.
DAUBENY.

Whitehurst and *Hayes* in support of the rule.—A witness cannot maintain an action for his expenses against the party who subpoenaed him, unless there has been a special contract between them. There is no distinction in principle between an action by a witness for compensation in respect of loss of time, and for the recovery of expenses. [*Parke, B.*—The statute 5 Eliz. c. 9, recognises the obligation of the party to pay the expenses.] The same rule applies to a witness attending in a civil as in a criminal proceeding. [*Parke, B.*—In a criminal proceeding his attendance is a matter of paramount public importance; and besides, the witness is to be paid by the county, and not by the prosecutor, so that there can be no implied promise to pay. *Alderson, B.*—In a criminal case, the expenses of the witness need not be tendered.] In *Goodwin v. West*, an express promise was alleged in the declaration. [*Parke, B.*—There is an implied contract arising out of the duty to attend, in consequence of the service of the subpoena. The party at whose instance it

(a) Cro. Car. 522, 540. (b) 1 Camp. 14, 180 a. (c) 10 A. & E. 162.

1850.
 PELL
 v.
 DAUBENT.

is served, does what is tantamount to saying, "If I do not pay your expenses now, I will at a future time." In *Robins v. Bridge*, it was not doubted that the defendant in the action was liable; the only question was whether the attorney was.] It is submitted that no implied promise can arise to pay expenses incident to the discharge of an obligation imposed by law. [*Alderson, B.*—Surely no person can be compelled to do an act for the benefit of another without being paid his expenses.] The witness may decline to attend, unless his expenses are paid; he may, however, waive that right: *Newton v. Harland (a)*; and if he do so, he has no remedy by action.—They also referred to *Vansandau v. Browne (b)*.

PARKE, B.—It is not absolutely necessary to decide the abstract point, whether, in the absence of an express contract, a witness can maintain an action for his expenses against a party to the suit who has subpoenaed him, because that objection ought to have been taken at the trial. The cause was conducted irrespective of that point, and had the defect been pointed out, it might perhaps have been supplied; it would therefore be unjust to grant a new trial on that ground. But I think the plaintiff could maintain the action, even supposing there was no express contract between the parties. If a witness in a civil action chooses to go to the Assizes without any tender of, or asking for, his expenses, that is some evidence for the jury that both parties understood that he was to be paid his expenses if he went. Therefore, upon the principal ground, the rule ought to be discharged; but, on the ground of the verdict being against evidence, the rule may be absolute for a new trial on payment of costs.

ALDERSON, B.—I am of the same opinion. It appears to me that the plaintiff has a right to maintain the ac-

(a) 1 M. & G. 956.

(b) 9 Bing. 402.

tion, and that there was some evidence in support of his claim. The only question is, whether there must be an express promise to pay the expenses, or whether a promise is to be implied from the nature of the transaction. I think it is. The one party is to receive a benefit, the other to confer it. If a person goes to another, and, by a subpoena, desires the latter to serve him by giving evidence at a trial, and he, having a right to refuse unless his expenses are paid, goes to the trial, it is upon the faith that what he does not require to be paid will be paid; and therefore it is very reasonable to imply a promise to pay. That is the conclusion to be drawn by the jury from the facts, and in this case they might have inferred a promise to pay a reasonable remuneration. The point, however, was not raised at the trial, or my brother *Platt* would have submitted it to the jury.

1860.
 PHILL
 v.
 DAUBNEY.

PLATT, B., concurred.

Rule accordingly.

BAKER v. HEARD.

DEBT.—The first count of the declaration stated that the defendant was indebted to the plaintiff in 50*l.* for the In an action for dividends sold and assigned, and
 on an account stated, it appeared, that the plaintiff, being entitled to the dividends on certain Bank stock, agreed to sell them to the defendant for 175*l.* After the bargain was made, it was found, that the stock was standing in the name of the Accountant-General, and that it required an order of that Court to enable the defendant to receive the dividends. It was then agreed that the deed of transfer should be executed, and the question as to the costs of obtaining the order should be referred to two solicitors. The deed was accordingly executed, and the sum of 125*l.* paid by the defendant to the plaintiff at the time of its execution. The deed stated, that the whole purchase money was paid, and released it; but in pursuance of a previous arrangement the defendant retained 50*l.* to abide the event of the reference. The plaintiff's evidence consisted of a paper signed by the defendant, in which credit was given for 125*l.* and 50*l.* stated as remaining due. The defendant gave in evidence the deed of transfer, and also an agreement, signed by the parties at the time of signing the above paper, to refer the question as to the above-mentioned costs, and an arrangement whereby the 50*l.* was to abide the decision of that question:—*Held*, first, that the plaintiff could not recover the remainder of the purchase-money under the first count, inasmuch as there was no debt until the deed was executed, and upon its execution the debt was released.
 Secondly, that there was no evidence of an account stated.

1859.

BAKER
v.
HARRIS.

price and value of certain dividends sold, assigned, and set over by the plaintiff to the defendant, at his request. There was also a count for money due on an account stated.

Pleas, except as to 12*l*, parcel &c., never indebted, payment, and set-off, and as to the 12*l*, payment of that amount into Court.

At the trial, before *Erle, J.*, at the Exeter Summer Assizes, it appeared that the plaintiff, being entitled, during the life of his mother, to the dividends on 77*5l* Three per Cent. Consolidated Bank Annuities, agreed with the defendant to sell them to him for 175*l*. After the bargain was made, it was found that, in consequence of a suit relating to the plaintiff's family, then pending in the Court of Chancery, the stock was standing in the name of the Accountant-General of that Court; and in order to transfer to the defendant the right to receive the dividends, it would be necessary to obtain from the Court of Chancery an order for that purpose. A question then arose as to which party should bear the expense of obtaining such order; and it was ultimately arranged that the deed of transfer should be executed, and that the question respecting the costs of the order should be referred to two solicitors. The deed was accordingly executed, and the sum of 125*l* paid by the defendant to the plaintiff at the time of its execution. The deed stated that the transfer was in consideration of the sum of 175*l*. then paid to the plaintiff, "the receipt whereof the plaintiff thereby acknowledged, and from the same and every part thereof released and for ever discharged the defendant." In pursuance, however, of a previous arrangement, the defendant retained 50*l* to abide the event of the reference. On two subsequent occasions the plaintiff applied to the defendant's attorney for portions of the 50*l*, which were paid to him. The plaintiff's counsel opened his case by merely giving in evidence, in support of the account stated, the following document, which was admitted under a Judge's order:—

“ Exeter, April 18th, 1849.

“ Baker to Heard.

“ To amount of purchase-money . . £175 0 0

“ Amount paid on execution of deed
of assignment, dated this day . . 125 0 0

“ Remaining due . . . £50 0 0”

(Signed by defendant).

The defendant's counsel then put in and proved the deed of transfer, and also an agreement, signed by the parties at the time of signing the above document, referring the question respecting the above-mentioned costs. He also proved the arrangement, that the 50*l.* was to abide the decision of that question. The defendant also adduced evidence to shew that, at the time the sums were paid to the plaintiff on account of the balance, it was agreed that the reference should be given up, and that each party should pay an apportioned part of the costs; and that the portion of the costs payable by the plaintiff under this arrangement, together with certain other deductions not disputed, and the amount paid into Court, made up the 50*l.* There was, however, conflicting evidence as to any such arrangement having been entered into. It was submitted, on the part of the defendant, first, that the plaintiff could not recover on the first count, inasmuch as the deed was an answer to that count; secondly, that there was no evidence of an account stated. The learned Judge left it to the jury to say whether the plaintiff had agreed to pay a portion of the costs in question; and they having found for the plaintiff, leave was reserved for the defendant to move to enter a verdict for him on both counts.

A rule nisi having been obtained accordingly,

Crowder and Montague Smith shewed cause (Dec. 3).—
The deed might have been pleaded by way of estoppel, or

1850.

BAKER
v.
HEARD.

1850.

BAKER

v.
HEARD.

as a release; but that not having been done, the matter is at large, and the jury are bound to find according to the fact. There are numerous authorities to shew that an estoppel is of no avail unless pleaded. Thus, in *Bowman v. Rostron* (a), the declaration stated the execution of a deed by the plaintiff and defendant; the plea did not traverse the execution, but alleged new matter, upon which the replication took issue. The deed was put in at the trial, and its recital directly contradicted the new matter alleged in the plea; and it was held nevertheless, that the defendant was not precluded from submitting such matter of defence to the jury, inasmuch as the plaintiff had not pleaded the recital of the deed by way of estoppel. So in *Magrath v. Hardy* (b), where to an action for money had and received the defendant pleaded a recovery by foreign attachment at the suit of a creditor of the plaintiff's, and that the creditor had execution of the sum recovered according to the custom of London, to which the plaintiff replied that no execution was executed, on which the defendant joined issue; it was held that, the plaintiff having joined issue on the fact of execution, the jury were not estopped by a record of satisfaction in the foreign attachment from finding according to the fact. *Young v. Raincock* (c) also establishes that, if a party who is entitled to take advantage of an estoppel, instead of pleading it, takes issue on the fact, the matter is at large, and the jury may disregard the estoppel. Also in 1 Wms. Saund. 325 a, it is said, that "the rule appears to be general with respect to estoppels by deed, that the estoppel must be pleaded, *if there be an opportunity*; otherwise the party omitting to plead it waives the estoppel, and the jury must find the truth." In an action for mesne profits the defendant is not estopped from disputing the plaintiff's title, unless the judgment in ejectment be pleaded as an estoppel: *Doe v. Wright* (d). This

(a) 2 A. & E. 295, n.

(c) 7 C. B. 310.

(b) 6 Scott, 627; 4 Bing. N. C.

(d) 10 A. & E. 763.

doctrine is thus explained by *Parke, B.*, in *Carpenter v. Buller* (a), "If a distinct statement of a particular fact is made in the recital of a bond or other instrument under seal, and a contract is made with reference to that recital, it is unquestionably true that, as between the parties to that instrument and in an action upon it, it is not competent for the party bound to deny the recital, notwithstanding what Lord Coke says on the matter of recital in Co. Litt. 352. b.; and a recital in instruments not under seal may be such as to be conclusive to the same extent. . . . But there is no authority to shew that a party to the instrument would be estopped in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts so admitted, though the recitals would certainly be evidence."—They then referred to the pleadings, and argued that there was no plea under which the defendant could set up the release as a defence.

1850.
BAXTER
v.
HEARD.

Maynard in support of the rule.—It is not denied that, in order to take advantage of an estoppel, it must be pleaded; but the objection here is, not that the deed operates as an estoppel in the sense of something which prevents the truth from being shown, but that there never was in fact any debt recoverable under the first count, for the purchase-money was not due until the deed was executed, and upon its execution, eo instanti, the debt was released. It resembles the case of an indebitatus count for land bargained and sold, which, as observed by *Parke, B.*, in *Hallen v. Runder* (b), cannot in general be sustained, because the deed of conveyance, which must be shewn to pass the interest in the land, generally contains a release of the purchase-money. Possibly the plaintiff might recover the money, but it must be by a different form of action. There

(a) 8 M. & W. 209.

(b) 1 C. M. & R. 266.

1880.
 BAKER
 v.
 HEARD.

is an analogous case where, on the purchase of goods, the payment is contemporaneous with the contract, so that the purchaser never was indebted at all: *Dicken v. Neale* (a), *Dowsey v. Barnett* (b). Here the deed had no operation until it was executed; and the moment the dividends were assigned, their price was released; so that there was no instant of time at which the defendant was indebted in respect of them. The transaction was, in legal effect, a payment of the price of the dividends at the moment the deed was executed. [*Crowder* referred to *Littlechild v. Banks* (c)]. To constitute payment it is not necessary that money should actually pass: *Standish v. Ross* (d). A settlement of accounts between two parties amounts to payment: *Gingell v. Perkins* (e). The present case is not distinguishable from *Baker v. Dowsey* (f), where the plaintiff declared, that the defendant was indebted to him in account; and thereupon, in consideration that the plaintiff would accept the work and labour of the defendant as a plumber to the extent of that debt, the defendant promised to do the work. It was proved that the plaintiff had assigned by deed certain premises to the defendant for a sum of money therein mentioned. The deed stated that sum to have been paid, and released the defendant therefrom. In fact, part of the purchase-money had not been paid; but it was agreed between the parties at the time of the execution of the deed, that part of the purchase-money should be retained by the defendant, and that he should do work for the plaintiff to that amount; and it was held that, inasmuch as the original debt was extinguished by the release in the deed, and no new debt created, but merely an obligation to do work arising out of a new special contract, that ought to have been declared upon. In like manner, assuming the legal effect of this

(a) 1 M. & W. 556.

(b) 9 M. & W. 312.

(c) 7 Q. B. 739.

(d) 3 Exch. 527.

(e) 4 Exch. 720.

(f) 1 B. & C. 704.

1850.

Baker
v.
Hoard.

transaction to be, that the whole purchase-money was paid, and part handed back to the purchaser to abide the event of the reference, if the plaintiff is in a situation to recover it, he should have declared on the special contract.—Secondly, there was no evidence of an account stated. It is well established that, to make a good account stated, so as to sustain an indebitatus count in that form, the account must be stated of and concerning a debitum in presenti: *Burgh v. Legge* (a). It may even be doubtful whether the debt must not be one presently payable. Here the balance of the purchase-money was payable on a contingency, viz. the event of the decision as to which party was to pay the costs of the order in Chancery, and it was uncertain whether any part of it would ever become a debt at all. [*Martin, B.*, referred to *Irving v. Vesich* (b)]. That was a case of the Statute of Limitations, and consequently there was a present debt. An account stated cannot be made a consideration for a promise to pay in futuro: *Hopkins v. Logan* (c).—He also referred to *Sinclair v. Baggeley* (d), *Earl of Falmouth v. Thomas* (e), *Cocking v. Ward* (f), *Knowles v. Michel* (g).

Cur. adv. vult.

ALDERSON, B., now said—In this case, which was argued yesterday before my brothers *Parke*, *Platt*, *Martin*, and myself, after much consideration, we are of opinion that the rule must be absolute. The question depended upon whether the plaintiff could recover on either of two counts in the declaration. The first was a count for dividends sold, assigned, and transferred by the plaintiff to the defendant. These dividends were, in consideration of 175*l.*, assigned to the defendant by a deed, which contained a

(a) 5 M. & W. 418.

(b) 3 M. & W. 90.

(c) 5 M. & W. 241.

(d) 4 M. & W. 312.

(e) 1 C. & M. 89.

(f) 1 C. B. 858.

(g) 13 East, 249.

1850.

BAKER

v.

HEARD.

clause stating that the whole purchase-money had been paid, and released it. We think that, inasmuch as, under the circumstances, there could not be any debt until the execution of the deed itself, and that, inasmuch as, by the execution of the deed, the debt was released, there never was a point of time at which there was any duty on the part of the defendant to pay the money sought to be recovered under the first count; and, consequently, that the deed was a complete answer to that count.

We are also of opinion that there was no evidence to support the count on an account stated. The document produced on the part of the plaintiff, coupled with the agreement given in evidence by the defendant, was in effect an arrangement that 125*l.* only of the purchase-money should be paid, and that 50*l.* should be disposed of by a new contract, to abide the result of the arbitration respecting the allowance of the expenses of the order for obtaining payment of the dividends. These expenses might have absorbed the whole of the 50*l.*, or they might have absorbed only a portion. That matter was to be determined in a certain way by the arrangement entered into between the parties. We think that could not be an account stated. Whether or not, if the event had happened, it might have become an account stated, we do not decide; for we are of opinion, on looking over the evidence, that there never was any decision of that question. Therefore the verdict was also wrong upon the second count; and, consequently, it ought to be entered for the defendant on both counts.

PARKER, B.—I did not hear the whole of the argument; but, so far as I did, I entirely agree with what my brother *Alderson* has said.

PLATT, B., and MARTIN, B., concurred.

Rule absolute.

1850.

IN THE EXCHEQUER CHAMBER.

(In Error from the Court of Exchequer).

DODGSON v. BELL.

Nov. 30.

SCIRE FACIAS by the plaintiff, as public officer of "The Bank of Whitehaven," on a judgment for 1344*l.* 7*s.* 8*d.* recovered against the public officer of "The Newcastle-upon-Tyne Joint-Stock Banking Company." The scire facias stated in the usual form the recovery of the judgment, and alleged that the defendant, at the time of the issuing of the writ of scire facias, was a member of the last-mentioned Company.—Plea, that the defendant was not, at the time of the issuing of the writ of scire facias, a member of the copartnership called "The Newcastle-upon-Tyne Joint-Stock Banking Company," modo et formâ.

The issue raised on this plea was tried before *Patteson, J.*, at Newcastle-upon-Tyne, on the 30th of July, 1849. The material facts proved and admitted by the parties to be true were as follows:—

The defendant, on the 23rd of September, 1843, married one Mary Stephenson, who, in 1839, became, and at the time of her marriage continued to be, a shareholder in the Newcastle-upon-Tyne Joint-Stock Banking Company, in respect of twenty original shares of 25*l.* each, which were allotted to her by the directors of the Company on her application. She received dividends upon those shares up to the beginning of the year 1846; and she paid calls made upon her by the Company in respect of the said shares before her marriage, and one call after her marriage. She

a member in respect of such shares, but might either dispose of the shares so vested in him, or at his option become a member on complying with certain requisitions:—*Held*, that the defendant was not a member of the Company for the purpose of execution against him by scire facias on a judgment against the public officer under the 7 Geo. 4, c. 46, s. 13.

The defendant's wife dum sola became an original shareholder in a banking copartnership; after her marriage, but without the defendant's knowledge, she received dividends and paid calls in her maiden name, and in that name was returned to the Stamp Office as a shareholder, but never executed any deed of settlement. The defendant was aware that his wife was a shareholder, but never interfered in the matter, and, when applied to for a call, said he would have nothing to do with it. The deed of settlement provided, that the husband of any female shareholder should not be

1850.
 {
 DODGSON
 v.
 BELL.

never executed the after-mentioned deed, nor any deed of accession thereto, nor was she ever required to do so; but a letter of allotment was delivered to and received by her in the following form:—

“Newcastle-upon-Tyne Joint-Stock Banking Company.

“Newcastle, 19th April, 1839.

“Madam,—The directors have allotted you twenty shares in the stock of this Company, on which you are requested to pay the first instalment of 2*l.* 10*s.* per share on the 1st of April, the second on the 1st of July, and the third on the 1st of October next, either at this office, or at the office of the London and Westminster Bank, 38, Throgmorton-street, London.”

“The deposit of 2*s.* 6*d.* per share, and the first instalment of 2*l.* 10*s.* to be paid at the bank on the 20th instant.

“I am, &c.,

“JOHN MORISON, Manager.”

“Miss Mary Stevenson, Newcastle.”

The several instalments and the deposit in the letter mentioned were paid by Mary Stevenson, at the times and in the manner in the letter mentioned.

The receipts given by Mary Stevenson for the last three dividends received by her on her said shares were in the form following:—

“No. 76.

“Dividend warrant.—Half-year ending 30th of June, 1844. M. Bell (late Miss Stephenson). Stock paid up, 250*l.* Dividend at 6*l.* per cent., 7*l.* 10*s.* Newcastle-upon-Tyne, 8th of April, 1846. Newcastle-upon-Tyne Joint-Stock Banking Company. Pay self or bearer the sum of 7*l.* 10*s.*

“7*l.* 10*s.* (Signed) MARY STEPHENSON” (a).

(a) The other two receipts were in the same form, except that, instead of the words “M. Bell (late Miss Stephenson),” the words used were “Miss Mary Stephenson.”

The calls were paid by Mary Stephenson in her own name; and the name of the defendant never appeared in the books of the bank, nor in the shareholders' register of the Banking Company; and Mary Stephenson was always returned to the Stamp Office in London, in the yearly list of shareholders, as a shareholder in her maiden name. The defendant was not aware of his wife Mary Stephenson paying any of the calls, or receiving any of the dividends as aforesaid; but he knew that she was a shareholder in the bank when he married her.

The Company's deed of settlement was put in evidence, bearing date the 2nd of July, 1836, the material parts of which are as follows:—

By the interpretation clause it was provided, that the expressions 'shareholders' and 'members' shall respectively mean the owners for the time being of shares in the capital of the said Company.

Clause 12. "That the persons in whose names the shares should stand should be deemed the owners thereof."

Clause 13. "That the shares in the capital of the Company shall, as between the shareholders thereof and their respective representatives, be considered as personal estate; and that there shall not be any right of survivorship amongst the shareholders with respect to such shares, but that every shareholder shall have a separate right to his share, and the same shall be vested in him as part of his personal estate, but subject to such provisions in the deed of settlement as shall for the time being affect such shares."

Clause 14. "That each shareholder shall be entitled to the profits, and be subject to the losses of the Company, in proportion to the number of shares."

Clause 27. "That before the assignee of a bankrupt or insolvent shareholder, or the executor, administrator, or legatee of a deceased shareholder, or the husband of any female shareholder, shall sell, transfer, or assign any shares vested in him in any such capacity, or shall become

1850.
DODGSON
&
BELL.

1850.
DODGSON
v.
BELL

a member of the Company in respect of such shares, or receive any dividend in respect of the same, he shall leave for inspection, at the banking-house of the Company in Newcastle-upon-Tyne, the assignment, probate, or the letters of administration under which, or the certificate of the marriage with the person in whose right he shall claim to be entitled to such shares, or shall otherwise prove his title thereto to the satisfaction of the directors."

Clause 28. "That the husband of any female shareholder, or the executor, administrator, or legatee of any deceased shareholder, or the assignee of any bankrupt or insolvent shareholder, shall not be a member of the Company in respect of the shares vested in him in any of those capacities; but such assignee, husband, executor, administrator, or legatee, may either dispose of the shares so vested in him, or, at his option, become a member of the Company in respect of such shares, on complying with the provisions next hereinafter expressed."

Clause 29. "That the husband of any shareholder, or the executor, administrator, or legatee of a shareholder, who shall be desirous of becoming a member of the Company in respect of the shares which may so become vested in him, shall give notice in writing at the banking-house of the Company in Newcastle-upon-Tyne of such his desire; in which notice shall be expressed the name and place of abode of the person giving the same, and the name of the shareholder in whose right he claims, and the number of shares in respect whereof he is desirous of becoming a member; whereupon, and upon otherwise complying with the provisions of the deed of settlement, he shall be admitted a member of the Company in respect of such shares, and have the same transferred into his own name; and shall be personally charged with the duties and liabilities incident to the ownership thereof"

Clause 30. "That the husband, or the executor, administrator, or legatee of any shareholder, who shall not so

elect to become a member of the Company, and also the assignee of every bankrupt or insolvent shareholder, shall be entitled to receive any dividend which shall have become due on the shares so vested in him before his title thereto accrued, but not to any dividend which shall become due on the same shares after his title shall have accrued; but, till some person shall have become a member of the Company in respect of the same shares, such dividends shall remain suspended, and shall not be paid till the transfer of the shares, in respect of which such dividends became due, shall be completed; and the new holder thereof may claim the same; and every transfer shall carry with it the profits and dividends of the share of the capital and of the guarantee fund in respect of the shares so transferred, so as to bar the right and interest of the party making such transfer in respect of such transferred shares."

1850.
DODGSON
v.
BELL

Clause 31. "That in case any person in whom any shares shall, by original subscription, or by purchase, bequest, marriage, representation, or other mode of acquisition or devolution, become vested, and who shall not have executed the deed of settlement, shall, for six calendar months after notice in writing given to him for that purpose, neglect or refuse to execute the same, the directors may declare the shares so vested in the person so neglecting or refusing, and all benefit thereof, to be forfeited to the other shareholders, and the same shall be forfeited accordingly."

Clause 32. "That every person to whom shares shall be transferred, and who shall not then be a member of the Company in respect of any other shares, and every person who, being the husband of any shareholder, or the executor, administrator, or legatee of any shareholder, shall, by notice in writing as aforesaid, signify his desire to become a member of the Company in respect of the shares vested

1850.
 DODGSON
 v.
 BELL.

in him in such capacity, and shall not at the time of the said shares becoming vested in him be a member of the Company in respect of any other shares, shall, as to all duties, obligations, claims, and demands upon or against him in respect of such shares, be considered a member of the Company from the time of the same shares being so transferred to or so becoming vested in him; but as to all profits and rights, privileges, and benefits to arise from the same shares, such person shall not be considered as a member, until he shall have executed the deed of settlement, or some deed of accession thereto."

It was further proved, that the defendant had never done any of the acts required by the 29th clause; and that, in answer to an application made to him by the solicitor of the Company touching a call upon the said shares, he replied, that "he would have nothing to do with it, and would not interfere at all." Neither the said Mary Stephenson nor the defendant made any assignment or transfer of these shares. The learned Judge directed the jury that the defendant was entitled to a verdict; and the jury accordingly found for the defendant.

The plaintiff's counsel tendered a bill of exceptions to the above ruling; and a writ of error having been brought thereon, the case was argued (November 30 (a)), by

Unthank for the plaintiff.—The object of this bill of exceptions is to review the decisions of the Court of Exchequer in *Ness v. Angas* (b) and *Ness v. Armstrong* (c), which, it is submitted, cannot be supported. The judgment of the Lord Chief Baron in *Ness v. Angas* proceeds on the mistaken notion that the plaintiff might have resorted to the common-law remedy by action against the

(a) *Coram Patteson, J., Coleridge, J., Wightman, J., Erie, J., Talfourd, J., and Williams, J.*

(b) 3 Exch. 805.

(c) 4 Id. 21.

defendant as a partner; but it is evident, from the case of *Steward v. Greaves* (a), that the members of a banking copartnership, established under the 7 Geo. 4, c. 46, can only be rendered liable by scire facias on the judgment against the public officer. The question then is, whether that statute applies to persons in the situation of partners at common law, or whether the term "member" must be construed with reference to the deed of settlement, and as meaning partners inter se. The 7 Geo. 4, c. 46, begins by reciting the 39 & 40 Geo. 3, c. 28, which declares the privilege of the Bank of England to be that no partnership exceeding six persons shall carry on the business of bankers. That affords some key to the construction of the statute in question. The privilege of the Bank of England would be of little value, if it were competent for any number of persons to establish themselves as a banking copartnership, while, under certain circumstances, six only of them were to be considered as members. The 7 Geo. 4, c. 46, s. 1, then enables banking copartnerships, of more than six persons, to be established on certain conditions; but expressly provides that every "member" shall be responsible for all the debts of the Company, notwithstanding any agreement to the contrary. The term "member" is there used in the sense of partner at common law. The 12th clause of the deed says, that those only shall be members whose names are on the register of shareholders; so that if the word "member" in the statute is to be construed by the terms of the deed, there would be a great opening for fraud. A number of wealthy persons might form a banking copartnership, and, by putting on the register the names of persons of no responsibility, reap the profits but escape the loss; or if women only were shareholders, and they all married, their

1850.
 DODGSON
 v.
 BELL.

(a) 10 M. & W. 711.

1830.
DODGSON
v.
BELL.

husbands would receive the benefit, but incur no risk. Throughout the 7 Geo. 4, c. 46, the word "member" is used as synonymous with "partner." The remedy given by the 9th section is confined to debts owing to or from the "copartnership." That manifestly applies to the Company *quà* partners, because the 12th section provides, that every judgment against the public officer shall have the same effect against the property of the copartnership and of every member thereof, as if it had been recovered against the copartnership. Then, by the 13th section, execution upon a judgment against the public officer may be issued against any member for the time being of the copartnership; or, if that be ineffectual, against any person who was a member at the time of the contract, or became a member before then, or was a member at the time of the judgment; provided, that no execution shall issue after the expiration of three years after any person shall have ceased to be a member. That is a bargain made with the Bank of England in consideration of its waiving its privileges. The creditor's right to sue persons who have ceased to be members is limited to three years; on the other hand, the creditor has the advantage of suing partners who take upon themselves the liability of the original members, or, if that be unavailing, the members at the time of the judgment. Those provisions ought to receive a liberal construction in favour of creditors, and not a strict construction in favour of debtors, who enter into the deed of partnership unknown to creditors. *Rolfe*, B., in his judgment in *Ness v. Angas*, considered that the term "member" meant a member in the strictest sense of the word, inasmuch as the doctrine respecting persons holding themselves out as partners, and entering into contracts in that character, did not apply to copartnerships of this kind. The question as to the liability of a person by holding himself out as a partner can very seldom

1850.

DODGSON
v.
BELL.

arise in the case of a joint-stock Company; but supposing it did, if the process were against a member at the time of execution or of judgment, the holding himself out as a partner would not prove him to be so; but it would in the case of a partner at the time of the contract, for there is no reason why a person who obtains something from another by that representation should not be estopped from saying that he is not a partner. However, the question here is, whether the defendant is a partner; and though he does not comply with the strict formalities of the deed, it is he who in point of law has a right to participate in the profits, and is therefore a partner. There is nothing in the deed to prevent the transfer of these shares by operation of law; on the contrary, the marriage divests them from the wife and gives them to the husband, the same as, on her death while sole, they would pass to her executor, or, on her bankruptcy, to her assignee. Clauses 27, 28, 29, and 30 treat the shares as having vested in the husband. They give him the option of being placed on the register of shareholders, or of transferring the shares. The profits are only suspended until he has exercised his option; if he were to sell the shares, he would convey all the profits from the time he became a member. [*Erle, J.*—Marriage, death, or bankruptcy, in general, dissolves partnership. You say, that if the husband, executor, or assignee refuse to sell, they become partners. *Wightman, J.*—Do you contend that an executor would become a member against his will?] The deed makes him a member, for by it his testator has agreed to take an undivided share in the stock of the Company. He may, however, plead that the shares are worthless, and that he has no assets. A husband may transfer the shares, and so rid himself of all liability. There are numerous cases which shew that the husband of a female shareholder in a joint-stock Company is liable as a contributory under the

1850.
 {
 DODGSON
 v.
 BELL.

Winding-up Act: *Klught's case*(a), *Gouthwaite's case*(b),
Burlinson's case(c), *Sadler's case*(d).

Knowles (with whom was *Hugh Hill*), for the defendant
 in error, was not called upon to argue.

PATTESON, J.—This is a scire facias to fix the defendant with the payment of a judgment debt recovered against the public officer of the Newcastle-upon-Tyne Joint Stock Banking Company, of which the defendant is alleged to be a member for the time being. The Act upon which the scire facias is founded, is the 7 Geo. 4, c. 46, s. 13. [His Lordship read the section.] The facts of the case were all admitted, for the purpose of reviewing the decisions of the Court of Exchequer in *Ness v. Angas*, and *Ness v. Armstrong*, upon which at the trial I was requested to act. It appeared that the defendant's wife was a member of the Company originally, but she never executed any deed. Probably that is not very material. The defendant, when he married her in 1843, was aware that she had some shares in this Company; but he never interfered in the matter, or took any steps to have the shares transferred into his own name in the books of the Company; and they continued there in his wife's maiden name, and the return to the Stamp Office was in that name. It also appeared, that she paid some calls, and received dividends after her marriage; and it is found also, that her husband was not aware of these facts, and that, on his being applied to for a call, he said he would have nothing to do with it. He therefore has done no act himself of any kind, by which he has taken to himself the benefit of these shares. So far this case differs from *Ness v. Angas*, because there the husband had received dividends in his wife's name, and besides, in that case, the shares were bought by the wife

(a) 3 De G. & S. 210. (b) Id. 258. (c) Id. 18. (d) Id. 36.

after her marriage. The question here is, whether the defendant was shewn to be a member for the time being of the Company. Some observations were made as to the effect of the recital in the Bank of England Act, but that has no bearing on the case. It is argued, that these shares would vest in the husband in his marital right upon his marriage; that by the common law he would become a shareholder; and that there is nothing in the deed to prevent the operation of the common law. It may be true that these shares, being personal property, would vest in the husband; but that must be subject to the provisions of the deed of partnership by which the Company was originally constituted, so far as those provisions are consistent with the law of the land. I do not see how any one can entertain a doubt about those provisions. By clause 12, the persons in whose names the shares shall stand, shall be deemed the owners: the only person in whose name these shares stood was the wife *dum sola*. Perhaps, however, that circumstance is not conclusive. Then clauses 27 to 32 shew what is to be done in case of a transfer by operation of law, in order to render the person to whom the shares are so transferred a member of the Company. If any words can be clear, those words are clear, that the mere vesting by operation of law of shares in the husband shall not make him a member of the Company, unless he has done certain acts. The word "vested," in the deed, has been pressed upon us in order to found an argument that the deed itself acknowledged that by marriage the shares vested at common law in the husband. It recognises his right indeed, but says, that he must complete that right by doing certain acts before he can become a member. By clause 27, he must leave with the Company a certificate of his marriage. Then an option is given him either to sell the shares or to become a member, provided he has furnished the Company with such certificate. [His Lordship read clause 28.] If those words have any mean-

1850.
 }
 DODGSON
 v.
 BELL.

1850.
DODGSON
v.
BELL.

ing, they shew, that so far as regards the members of the Company inter se, the husband does not become a member by reason of the shares having vested in him in his marital right, unless he takes some further steps. Then clause 29 shews what steps are to be taken when he desires to become a member: he is to give notice of his desire, and to comply with the provisions of the deed; and thereupon he will be admitted a member, and have the shares transferred to him; and then he is liable to be personally charged with the debts and liabilities incident to the ownership thereof. By clause 30, if he does not elect to become a member, the dividends are to be suspended till some person becomes a member in respect of the shares. Then follows a proviso, clause 31, that if any person in whom any share shall become vested shall for six months neglect or refuse to execute the deed of settlement, the directors may declare the shares so vested, forfeited. Then again, by clause 32, the husband of any shareholder, who shall by notice in writing signify his desire to become a member, shall as to all obligations be considered a member from the time the shares vested in him, but not as to the profits until he has executed the deed of settlement. Can any provisions be more clear, so far as regards the rights of a person who has married a female shareholder? They distinctly provide, that he shall not be entitled to any profits until he shall come in and execute the deed; and that, if he does not choose to do so, or to transfer them to any one else, after six months' notice the shares shall be forfeited. It is clear, therefore, that the defendant, not having done any act of any sort, or intimated a wish to become a member of the Company, is not a member so far as the Company is concerned. Then, is he a member as regards creditors? It is admitted that he cannot be made a member by having induced persons to contract with him in that character, because here there are no such facts. Then, how is he a member? The 7 Geo. 4, c. 46, requires that

he should be a member for the time being; but if he is not a member of the Company inter se, how can he be a member at all? In the case of *Ness v. Angas, Rolfe*, B., explains how it is that a person who holds himself out as a partner is made liable, not because he is a partner, but because he is not allowed to take advantage of his own wrong. We are all of opinion that, under this Act of Parliament, it is necessary that the person sought to be made liable should be an actual member of the Company; and that he does not become a member, and consequently subject to the proceeding by scire facias, until he has complied with the terms of the deed of settlement. Reference has been made to several decisions under the Winding-up Act; but they have little bearing on the present case. In *Angas's case*(a), the husband of a female shareholder was held not to be a contributory. But, in one or two of those decisions, where the husband was held to be a contributory, the wife dum sola had covenanted to do certain things, and therefore the husband was held liable; and an executor was held a contributory in his representative character. Here the difficulty is to establish the fact of the defendant being a member, for the circumstances negative any such conclusion; and therefore the verdict was quite right, and the judgment must be affirmed.

Judgment affirmed.

(a) 1 De G. & S. 560.

1850.
DODGSON
v.
BELL.

1850.

Dec. 2.

SUTHERLAND v. WILLS.

A defendant in error (the plaintiff below) is not, on affirmation of a judgment, entitled under the 3 Hen. 7, c. 10, to costs in error, where the judgment is satisfied before the writ of error is sued out, since the statute applies only to cases where there is a delay of execution.

THIS was an action of covenant brought in the Court of Exchequer by the defendant in error (the plaintiff below) to recover from the plaintiff in error (the defendant below) the amount of certain calls on shares held by him in the Neptune Marine Insurance Company (*a*). The defendant below, being under terms of pleading issuably, pleaded a non-issuable plea, whereupon the plaintiff below signed interlocutory judgment. Application was made to a Judge at chambers to set aside this judgment, and refused; but the proceedings were stayed on payment into court of the amount claimed, in order to allow the defendant an opportunity of moving the Court in arrest of judgment. The defendant accordingly obtained a rule nisi to arrest the judgment, which was subsequently discharged. Thereupon the costs were taxed, and a computation of interest made by consent, and the amount paid to the plaintiff; and the plaintiff obtained out of court the sum which had been paid in, so that it became unnecessary to issue execution. Afterwards the defendant sued out a writ of error, which was argued in the Exchequer Chamber in last Trinity Vacation (June 19), when the judgment of the Court below was affirmed (*b*). The plaintiff below then applied to the Master to tax his costs in error; but the Master declined to do so, being of opinion that under the circumstances the plaintiff below was not entitled to the costs in error.

Rochfort Clarke now moved for a rule calling on the plaintiff in error to shew cause why the Master should

(*a*) 4 Exch. 211.

(*b*) Ante, p. 715.

not tax the costs of the defendant in error (a).—The application is made under the 3 Hen. 7, c. 10, which, after reciting that “oftentimes plaintiffs that have judgment be delayed of execution, for that the defendant” &c. “sueth a writ or writs of error to annul and reverse the said judgment, to the intent only to delay execution of the said judgment,” enacts, “that if any such defendant &c. sue, afore execution had, any writ of error to reverse any such judgment in delaying of execution, that then, if the same judgment be affirmed good,” &c., “the said person or persons, against whom the said writ of error is sued, shall recover his costs and damage for his delay and wrongful vexation in same, by discretion of the justice afore whom the said writ of error is sued.” It is submitted, that that enactment entitles the defendant in error to costs. There has, indeed, been no delay of execution, inasmuch as the debt and costs below were paid before any steps were taken to issue execution, and before the writ of error was sued out; but there has been a “wrongful vexation” by the proceedings in error, which the statute also contemplates as a ground for costs; and that vexation is equally the same whether the plaintiff is delayed in obtaining the fruits of his judgment or not. This case is, therefore, distinguishable from *Newlands v. Holmes* (b), where the application was founded on the 13 Car. 2, c. 2, stat. 2, which, on the affirmation of a judgment after verdict, gives the defendant in error double costs for the delay of execution, but says nothing about any wrongful vexation.

PATTERSON, J.—The term “delaying of execution” must mean delaying the plaintiff below in reaping the fruits of his judgment. That is not the case here, for the judgment

1850.
 SUTHERLAND
 v.
 WILLS.

(a) Coram *Patteson, J., Cole- and Talfourd, J.*
ridge, J., Wightman, J., Cress- (b) 4 Q. B. 858.
well, J., Erle, J., Williams, J.,

1850.
SUTHERLAND
v.
WILLS.

was satisfied before the writ of error was sued out. This case therefore does not fall within the provisions of the 3 Hen. 7, c. 10; and consequently the defendant in error is not entitled to costs in error.

Rule refused.

HELLAWELL v. EASTWOOD.

THIS case was decided in the present Sittings, but, from want of room, is omitted. It will, however, appear in an early part of the next Volume.

I N D E X

TO THE

PRINCIPAL MATTERS.

ACCORD.

See COVENANT, (2).

ACTION (CAUSE OF).

See SMALL DEBTS ACT, (2).

AFFIDAVIT.

See COSTS, (2).

AGREEMENT.

See COVENANT, (2).

RAILWAY COMPANY, (1).
STAMP, (2).

Where a building agreement between the plaintiff and defendant contained a proviso, that no instalment should be paid unless the plaintiff delivered to the defendant a certificate, signed by the surveyor of the defendant, that the works were performed according to the specifications:—*Held*, that the want of a certificate was a good defence under the general issue to an action for the instalments; and that the plaintiff was not at liberty to prove that it was withheld by collusion with the defendant. *Milner v. Field*, 829

AMENDMENT.

The Court refused to amend the indorsement on a pluries writ of summons by making the day of the date

of the first writ conformable to the fact, although the debt would otherwise be barred by the Statute of Limitations. *Medlicott v. Hunter*, 34

APOTHECARIES ACT, 55 GEO. 3, c. 194.

See COUNTY COURT, (1), 1.

ARBITRATION.

See ATTACHMENT.

EVIDENCE, (7).

LANDS CLAUSES CONSOLIDATION ACT, (1).

(1). *Costs*.

An agreement of reference contained a stipulation "that the costs of the agreement, and of the reference and award, should be in the discretion of the arbitrator, and be defrayed as he should direct." The arbitrator awarded that the defendant should pay a certain sum to the plaintiff, but made no mention of costs:—*Held*, that the award was therefore bad. *Richardson v. Worsley*, 613

(2). *Appointment of Arbitrator under 8 & 9 Vict. c. 18.*

A railway Company having refused compensation for injury done to the premises of B., he, on the 5th of December, served them with a notice under 8 & 9 Vict. c. 18, requiring

them to appoint an arbitrator on their behalf, and stating that it was *his intention* to appoint M. as his arbitrator; and that if, for the space of fourteen days after that notice, the Company failed to appoint an arbitrator on their behalf, he would appoint M. to act for both parties. The Company having refused to refer the matter to arbitration, B., on the 1st of January following, served them with a notice, which, after reciting that he had appointed M. as his arbitrator, stated that he then appointed M. to act as arbitrator on behalf of both parties. The arbitrator having awarded a certain sum to be paid to B., the Court refused to enforce or set aside the award on motion, intimating their opinion that there was no valid appointment of the arbitrator.

Semble, that, under the 8 & 9 Vict. c. 18, s. 25, an appointment by the claimant of an arbitrator to act for both parties is not valid, unless he has previously appointed an arbitrator on his behalf, and notified such appointment to the Company. *Bradley v. The London and North Western Railway Company*, 769

ARREST.

See BANKRUPT LAW CONSOLIDATION ACT, (4).
PRACTICE, (3).

ARREST OF JUDGMENT.

See PLEADING, I. (1), (7).

ASSUMPSIT.

Consideration.

A declaration alleged, that, in consideration that the plaintiff, at the defendant's request, promised to marry him, he promised the plaintiff to marry her. Averments: that the plaintiff hath continued and still is unmarried, and, until the discovery of the defendant's marriage, was ready

ATTORNEY.

and willing to marry him; that, after the defendant's promise, the plaintiff discovered that the defendant, at the time of his promise, was, and still is, married, and that the plaintiff had not, at the time of the defendant's promise, any notice of the defendant's then marriage:—*Held*, on motion in arrest of judgment, that the declaration was good; and that the plaintiff's remaining unmarried was a sufficient consideration to support the defendant's promise.

Quere, whether a promise by a married man to marry another woman after his wife's death, is void. *Millward v. Littlewood*, 775

ATTACHMENT.

See JUDGE'S ORDER.

An action having, by an order of Nisi Prius, been referred to an arbitrator, who was to settle all matters in difference between the parties, and to order and direct as to the proper distribution of certain property as to him should seem fit, he accordingly made his award, and awarded (inter alia) that the plaintiff "do, on or before the 23rd of March next, duly execute an indenture to be prepared by H. H. (the defendant), in words and figures following" (setting it out). No demand of the execution of the instrument was made upon the plaintiff before or on the day mentioned in the award:—*Held*, that the plaintiff was not liable to an attachment for refusing to execute the deed on demand made after the 23rd of March. *Doe d. Williams v. Howell*, 299

ATTESTATION.

See POWER.

ATTORNEY.

See PLEADING, II. (1).
STATUTE OF LIMITATIONS, (1).
TRIAL AT BAR.

(1). *Names on Roll.*

1. On the application of an attorney to be allowed to substitute the name of *J. Heaton D.* on the roll of attorneys, in the place of *J. D.*, this Court refused to alter the roll, but directed the Master to make a memorandum on the roll opposite the party's name, stating that he was now known by the name of *J. Heaton D.*, and that the memorandum was made by rule of Court. *In re Dearden, Gent., one &c.*, 740

2. The Court allowed an attorney, named "Thomas James Moses," to be admitted on the rolls of this Court as "Thomas James," although he had no royal licence to change his name, it being sworn that he was not apprehensive of any proceedings being taken against him by his former name. *In re Thomas James*, 310

(2). *Authority of Attorney to Receive Mortgage Money.*

The plaintiff lent to the defendant 1000*l.*, upon the security of an indenture, which contained a covenant by the defendant to surrender certain copyhold premises to the plaintiff's use. No surrender was made. D., who acted as attorney for both parties, signed a receipt for the money, and the title-deeds were delivered to him, and he prepared and delivered to the defendant, but without the plaintiff's knowledge, a schedule of the deeds, at the foot of which was a memorandum signed by D., acknowledging the receipt of the deeds, and undertaking to deliver them up on payment of the principal money and interest. The mortgage deed remained in D.'s possession, and he from time to time received the interest and paid it over to the plaintiff. The principal money was paid to D., who appropriated it to his own use, and died insolvent:—*Held*, first, that D.'s receipt for the principal, and the memorandum signed by him, were ad-

missible in evidence for the defendant. Secondly, that neither the possession of the mortgage deed nor the receipt of interest was any evidence of an authority to D. to receive the principal; and consequently that the plaintiff was entitled to recover it from the defendant. *Wilkinson v. Candlish*, 91

AWARD.

See ARBITRATION, (1).

ATTACHMENT.

LANDS CLAUSES CONSOLIDATION ACT, (1).

BAILIFF.

See PLEADING, II. (5).

BANK ACT, 7 & 8 VICT. c. 32.

A Company, consisting of a large number of persons subscribing small sums, was formed for the purpose of buying land, erecting dwellings thereon, and allotting the same to the subscribers. The allotment depended upon the result of a ballot. In connection with this Company there was established a bank for receiving the deposits of small capitalists and working men, upon the security of the property of the Company; and, as part of the same concern, a bank in which the subscribers of the Company might place their savings for purchasing their land from the Company:—*Held*, that the scheme was illegal, as being contrary to the Bank Act.

Quære, whether it was illegal as being contrary to the Lottery Acts, or whether it fell within the 11th section of the 12 Geo. 2, c. 28. *O'Connor v. Bradshaw*, 882

BANKING COPARTNERSHIP.

See HUSBAND AND WIFE, (2).

PLEADING, I. (4); III. (3), 2.

A Company of persons, established for the purpose of carrying on the business of bankers under the provi-

sions of the 7 Geo. 4, c. 46, in an action against a shareholder for the recovery of a debt, or for enforcing any claim or demand due to the copartnership, are *bound* to sue in the name of one of their public officers, and are not at liberty to sue in the names of the covenantees named in the deed of copartnership. The words of the 9th section of the Act "shall and may," are obligatory, and not merely permissive. *Chapman v. Milvain*, 61

BANKRUPT.

See BILL OF SALE.

COVENANT, (2).

FIAT IN BANKRUPTCY.

The defendant, a railway shareholder, became bankrupt on the 8th of February, 1848. On the 18th of the same month a call was made, and three other calls were subsequently made. On the 24th of April, 1848, the defendant obtained his certificate. The scrip was handed over to the assignees, and some correspondence took place between the trade assignees and the official assignee, in the course of which the former sent the latter a statement of the bankrupt's property, comprising in it the probable value of the shares in question, and containing in it an estimate of the amount forthcoming to work the fiat and pay dividends. The trade assignee subsequently wrote to the official assignee, suggesting the propriety of selling the shares. The shares, however, continued in the possession of the assignees:—*Held*, first, that there was no evidence of an acceptance of the shares by the assignees.

Secondly, that, the property in the shares continuing in the bankrupt, the claim was not barred by his certificate, inasmuch as it was not proveable as a debt due in futuro under the 51st section of the 6 Geo. 4, c. 16, or as a debt due on a contingency, within the meaning of the 56th section of

that Act. *The South Staffordshire Railway Company v. Burnside*, 129

BANKRUPT LAW CONSOLIDATION ACT, 12 & 13 VICT. c. 106.

(1). *Security in Consideration of not Opposing Bankrupt's last Examination.*

A security given by a bankrupt to a creditor, on consideration of his forbearing to oppose the bankrupt's last examination, is not void under the 12 & 13 Vict. c. 106, s. 202. *Taylor v. Wilson*, 251

(2). *Certificate given to Petitioning Trader.*

The certificate given to a petitioning trader, under the 12 & 13 Vict. c. 106, s. 216, only protects him from arrest at the suit of persons being creditors at the date of the petition, and who have received the notices required by that Act.

Therefore, where the acceptor of a bill of exchange petitioned under the arrangement clauses of that Act, and gave the requisite notice to the drawer, whom he supposed to be the holder of the bill:—*Held*, that the certificate did not protect him from execution on a judgment in an action by an indorsee of the bill. *Levy v. Horne*, 257

(3). *Judge's Order given by Trader.*

The 137th section of the 12 & 13 Vict. c. 106, which declares that a Judge's order, made by consent, given by a trader defendant in any personal action, unless filed as thereby required, and the judgment and execution thereon, shall be "null and void to all intents and purposes whatever," does not avoid such order, &c. as against the trader himself, but only as against his assignees if he afterwards become bankrupt. *Bryan v. Child*, 368

(4). *Protection from Arrest.*

In July, 1849, A. B. brought an

action against C. D., and the cause was tried on the 28th of November following, when a verdict was found for the plaintiff, with 22*l.* damages; and on the 19th of December costs were taxed for 79*l.*, and judgment was signed. On the 12th of November the defendant had obtained a protection under the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106. A private meeting was appointed for the 20th of December, and notice was given to all the creditors, including the plaintiff. On the 7th of December, the defendant filed his account, proposing to pay his creditors 7*s.* 6*d.* in the pound, with a satisfactory guarantee for due payment. The plaintiff's debt was entered in the account so filed thus: "A. B." (the plaintiff) "disputed, has got judgment for 22*l.* and costs estimated at 50*l.*" On the 20th of December, the defendant swore to the truth of his account; and at a second meeting of his creditors, on the 31st of January, 1850, three-fifths of the creditors, but of whom the plaintiff was not one, assented to the compromise, subject to a guarantee to be given by S. S.; and this arrangement was subsequently confirmed by the Court; and S. S. gave a guarantee, in which the consideration was stated thus: "In consideration of your having consented, &c." The defendant was arrested on a ca. sa. after the protection had been granted, and whilst it remained in force.

On motion to discharge the defendant out of custody, on the ground that he was protected from arrest as to the debt and costs:—*Held*, that he was entitled to his discharge, on the grounds, First, that the debt was truly specified in the account; that, although the sum of 22*l.* was incorrectly described as disputed, the verdict shewing it to be then due, inasmuch as the admission of the insolvent would not dispense with the proof of the debt under the statute, this description was immate-

rial; and that the amount was correct, as it was to be taken that the correctness of the account was sworn to at the time it was filed, which took place before the costs were ascertained.

Secondly, that the protection extended to the costs as well as the debt, which were merely accessory to the principal debt; and,

Thirdly, that assuming the guarantee so given to be void, as not disclosing any sufficient consideration, and, therefore, as incapable of being enforced, still that the protection was valid. *Southgate v. Saunders*, 565

BILL OF EXCHANGE.

See BANKRUPT LAW CONSOLIDATION ACT, (2).

MONEY PAID.

PLEADING II. (4); III. (1), 2.

PROMISSORY NOTE.

SMALL DEBTS ACT, (2).

BILL OF SALE.

The 61st section of the 1 & 2 Vict. c. 110, does not apply to bills of sale which convey the property absolutely, but only to an executory bill of sale.

In an action of trover for goods by the assignee of an insolvent, the plaintiff, in order to establish the insolvent's title to the goods in question at a certain time, gave in evidence a bill of sale, by which the insolvent, in consideration of the sum of 499*l.*, sold absolutely the goods to the defendant and other persons, and the plaintiff then produced evidence to impeach the validity of the bill of sale, by shewing that it was wholly void on the ground of fraud. The plaintiff having obtained a verdict—*Held*, that he was entitled to the costs incurred in the production of that evidence. *Hardy v. Tingey*, 294

BOND.

See PARTIES TO ACTION, (1).
PLEADING, III. (1), 1.

BOROUGH RATE.

The council of the borough of L., previously to making a borough rate, made an estimate under the 5 & 6 Will. 4, c. 76, s. 92, which estimate contained (amongst others) the two following items:—"Compensation to the late town clerk, three years and a half, 105*l.* 14*s.* 10*d.*, law expenses 800*l.*" The first of these items was, as it expressed, an award of compensation to a former town clerk, who had been dismissed from his situation by the corporation. The second item had been included in the estimate to meet the demand of the attorney to the corporation for costs and disbursements. The attorney had paid the sum of 467*l.* to a party to save the corporation from an execution; and this sum was one of the items included in the charges as a disbursement. At the time the estimate was made, the attorney had not delivered any signed bill of costs to the corporation. The council afterwards made a borough rate, which included the sums so mentioned in the estimate. At a meeting, which was *not a public one*, the borough council made an order, which directed the overseers of certain parishes within the borough to pay the proportions assessed upon their parishes out of the poor rates *made and collected*; and they also issued a warrant to their treasurer, commanding him, within one hundred days *from the date thereof*, to demand from the overseers the said proportions. The treasurer issued his precept to the overseers, requiring them, within one hundred days *after the receipt* thereof, to pay the proportions out of the poor rates *made and collected, or to be made and collected*. A warrant was issued by the defendants, one of whom was the mayor of Lichfield, and both justices of the borough, against an overseer who had not paid the proportion assessed in his parish. This warrant

contained the venue in the margin, and directed a certain sum to be levied by distress of the plaintiff's goods, and provided, that "if within the space of five days next after such distress by you taken, the sum of &c. shall not be paid, then you do sell the said goods;" and concluded thus:—"Given under our hands and seals, and under the corporate seal of the said borough and city. T. T. (L. s.), M. B. M. (L. s.), Justices of the said borough and city. Thomas (Corporation Seal) Johnson, Mayor." The defendant Johnson was not stated in the body of the warrant to be mayor of the borough:—*Held*,

First, that a borough rate is valid, though not made in public.

Secondly, that, assuming the rate to be retrospective (which, *semble*, it was not), yet being good upon the face of it, no objection to its validity was open as against the defendants.

Thirdly, that the warrant was good notwithstanding it directed the sum to be paid out of the rates *to be made and collected*; and, fourthly, that it was good, although it directed the overseers to pay the sum within one hundred days after the *receipt* of the warrant.

Fifthly, that it sufficiently appeared upon the warrant, that one of the defendants was mayor of the borough at the time of making the warrant.

Sixthly, that the warrant of distress appeared to have been issued within the jurisdiction of the mayor and justices, as the venue in the margin might be looked at for that purpose; and,

Seventhly, that the warrant was sufficient under the 27 Geo. 2, c. 20, although it did not fix the time for termination of the sale.

An action of replevin is maintainable against a person who improperly issues the warrant under which another's goods are distrained. *Jones v. Johnson*, 862

CANAL COMPANY.

See STATUTE.

CAPIAS.

See PRACTICE, (3).

CAPIAS AD SATISFACIENDUM.

See OUTLAWRY.

CERTIFICATE.

See AGREEMENT.

CHAPELRY.

See EVIDENCE, (3).

CHARTER-PARTY.

1. Under the terms of a charter-party, the plaintiff's ship was to proceed to B., or as near thereto as she could safely get, and to load from the defendant's agent a full cargo of timber. The vessel proceeded within the harbour at B., and there received a portion of the cargo, but owing to want of water she was then taken without the bar, but as near as she could safely get, where it was requested that the rest of the cargo should be delivered, which was refused:—*Held*, that the plaintiff had complied with the charter-party, and that the defendant was liable for such refusal. *Shield v. Wilkins*, 304

2. In an action on a charter-party, the declaration stated, that by a charter-party made between the defendant, the ship-owner, and the plaintiffs, it was agreed that the ship should proceed to two ports in Sicily, or usual place of loading, on and after the delivery of her outward cargo, and there load from the plaintiff's factors a full cargo, and thence proceed to Bristol; and that the vessel should have her orders before leaving Messina. The declaration, after containing averments that the ship arrived at Messina, and a general allegation of per-

formance by the plaintiffs, laid as a breach, that the defendant, within a reasonable time after the delivery of her outward cargo, and before the plaintiffs could have given orders for the ship to proceed to the said ports, made a contract with a third party for the conveyance of goods from Messina, and therewith and within such reasonable time as aforesaid, and before such reasonable time had elapsed, loaded his ship, and afterwards proceeded to London, without taking on board the cargo agreed to be taken from the plaintiffs, and thereby wholly incapacitated and deprived himself of the power of fulfilling the charter-party, although the plaintiffs, within such reasonable time as aforesaid, provided merchandise, and were ready and willing to load on board the said ship the said merchandise; and although the plaintiffs would have been ready and willing to have named and appointed and given orders to the defendant to proceed to two ports, and to have there loaded a full cargo:—*Held*, on general demurrer, that the declaration was bad, as it did not shew that the vessel had sailed before the lapse of a reasonable time for the performance by the plaintiffs of their part of the contract, and so did not shew that the defendant had incapacitated himself from performing his part of the contract; and that it ought to have contained an averment that the plaintiffs had performed their part, by giving orders, &c., and by tendering a cargo within such reasonable time. *Matthews v. Lowther*, 574

CHEQUE.

See PLEADING, I. (1).

CHURCHWARDEN.

See PROMISSORY NOTE.

CODICIL.

See DEVISE, (2), (3).

COMMON OF PASTURE

See PLEADING, III. (2).

COMPANIES CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 16.

See JOINT STOCK COMPANY.

PARTIES TO ACTION, (1).

PLEADING, I. (5), 1, 2.

CONDITION PRECEDENT.

See PLEADING, I. (2).

1. The plaintiff demised to the defendant a coal mine for forty-two years, at a certain yearly rent. The lease contained numerous covenants on the part of the lessee for payment of rent, and in respect of the working of the mine, &c., with a proviso for re-entry on breach of any of them; and also a proviso, that if the lessees should be desirous to quit the premises at the end of the first eight years of the term, and of such their desire should give the lessor notice in writing eighteen calendar months before the expiration of such eighth year, then, *all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessee having been observed and performed*, the lease should, at the expiration of the eighth year, be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might then be entitled to for breach of any of the covenants:—*Held*, in the Exchequer Chamber, (reversing the judgment of the Court of Exchequer), that the performance of *all* the covenants by the lessee was a condition precedent to his right to determine the lease. *Friar v. Grey*,

584

2. In an action of covenant upon a farming lease, the declaration alleged (*inter alia*) that the plaintiff and defendant did, by the said instrument,

covenant and agree that the lessor (the defendant) should, within eighteen months from the date of the lease, build a new shed and stalls for feeding cattle complete, at the upper end of a certain barn, &c., the whole of which was agreed to be left to the superintendence of the lessee and the lessor's son:—*Held*, on error, (in affirmance of the opinion of the Court of Exchequer on motion to arrest the judgment,) that the stipulation in the lease, that the work should be left to the superintendence of the parties named, was not a condition precedent to or concurrent with the covenant on the part of the defendant to do the work. *Jones v. Cannock*, 713

CONSEQUENTIAL DAMAGE.

See NEGLIGENCE, 2.

CONSIDERATION.

See ASSUMPSIT.

PLEADING, II. (4).

CONTRACT.

See ASSUMPSIT.

INFANT, 1.

MONEY HAD AND RECEIVED, 3.

RAILWAY COMPANY, (1).

WARRANTY, 2.

A. and B. having entered into a joint agreement with a Railway Company to execute a contract, called "the Morley contract," for the construction of a tunnel upon the line: A. assigned all his right and interest in the contract to B., and the latter agreed to pay A. a given sum "on the completion of the said contract." After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B., by agreement with the Company, abandoned the contract, and another was entered into between the Company and other persons, under which the

tunnel at the altered level was completed:—*Held*, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A. *Humphreys v. Jones*, 952

CONTRIBUTORY.

See WINDING-UP ACT.

CONVOCATION.

See PRIVY COUNCIL.

CORPORATION.

See RAILWAY COMPANY, (1).
PLEADING, III. (2).

COSTS.

See BANKRUPT LAW CONSOLIDATION ACT, (4).

BILL OF SALE.

JUDGE'S ORDER.

LANDS CLAUSES CONSOLIDATION ACT, (1).

(1). *Under 43 Eliz. c. 6.*

A certificate to deprive the plaintiff of costs under the 43 Eliz. c. 6, granted after judgment and execution, is wholly inoperative; but the Court will, nevertheless, under particular circumstances, give effect to it by setting aside the judgment and execution. *Lyons v. Hyman*, 749

(2). *Under County Courts Act.*

1. On motion for a suggestion to deprive the plaintiff of costs under the County Courts Act, 9 & 10 Vict. c. 95, an affidavit, which stated that the plaintiff did not dwell more than twenty miles from the defendant, was held bad, for not shewing the distance from the defendant's residence. *Room v. Cottam*, 820

2. Where the defendant's affidavits, on a motion for a suggestion under

the County Courts Act to deprive the plaintiff of costs, stated that the residence of the plaintiff was within twenty miles of that of the defendant, and that the cause of action arose wholly within the jurisdiction of the county court of B., which facts were denied by the affidavit of the plaintiff, the Court refused to determine the question on affidavits, and directed a suggestion to be entered. *Lewis v. Forsyth*, 904

3. Under the 129th section of the 9 & 10 Vict. c. 95, if a party sues in a superior Court, and his demand is reduced below the sum of 20*l.* by proof of part payment, he is not entitled to costs, unless the Judge before whom the cause is tried certifies that the action is fit to be brought in the superior Court. *Turner v. Berry*, 858

(3). *In Error.*

A defendant in error (the plaintiff below) is not, on affirmance of a judgment, entitled under the 3 Hen. 7, c. 10 to costs in error, where the judgment is satisfied before the writ of error is sued out; since the statute applies only to cases where there is a delay of execution. *Sutherland v. Wills*, 980

COUNTY COURT.

See COSTS, (2), 1, 2, 3.

SMALL DEBTS ACT.

(1). *Jurisdiction.*

1. By a plaint in a county court the defendant was summoned for a debt of 20*l.*, "for illegally practising as an apothecary." The particulars stated, that the action was brought to recover 20*l.*, for that after the 55 Geo. 3, c. 194, the defendant on divers days acted as an apothecary without a certificate, at four places named, by attending and supplying medicine to four persons mentioned, whereby the

defendant had forfeited the sum of 20*l*. By the 55 Geo. 3, c. 194, s. 20, any person who shall practise as an apothecary without a certificate, shall forfeit "for every such offence" 20*l*.—*Held*, on motion for a prohibition, that, whether the facts stated in the particulars amounted to four offences, or one only, the sum recoverable was limited by the summons and particulars to 20*l*, and therefore the county court had jurisdiction. *In re Apothecaries Company v. Burt*, 363

2. To a declaration in debt for goods sold, the defendant pleaded, first, that in an action brought by the now defendant in the county court of W. against the now plaintiff, the now plaintiff then set up a set-off as a defence, and gave notice to the now defendant that he would claim a set-off for 15*l*.; that it was adjudged that the now defendant was not indebted to the now plaintiff in the said sum of 15*l*, or any part thereof, and that the now plaintiff had no claim against the now defendant;—averring the identity of the two debts. Replication, that by the rules of the county court, made in pursuance of the statute, any defendant desirous of setting off a debt was bound to give notice of set-off to the clerk of the court; and that the now plaintiff did not give such notice:—*Held*, on demurrer, that the plea was bad.

The defendant pleaded, secondly, that in the county court of E., holden at W., before J. H. K., the judge of the court, and within the jurisdiction of the said court, the now defendant recovered against the now plaintiff a certain debt of 10*l*. 6*s*. 8*d*. due to the now defendant from the now plaintiff, within the jurisdiction of and recoverable in the said court, and 5*l*. 15*s*. 4*d*. for his costs; by which judgment it was ordered, that the now plaintiff should immediately pay the debt and costs to the now defendant, as by the

said record appeared.—Verification by the record, and offer to set-off the above sums:—*Held*, on special demurrer to the plea, that it was bad in not properly shewing that the county court had jurisdiction over the subject matter. *Stanton v. Styles*, 578

(2). Order to Pay.

A debtor summoned to a county court failed to appear, whereupon the judge verbally ordered that he pay the debt and costs "forthwith." About five o'clock in the afternoon of the same day, the bailiff served the debtor with an order, under the seal of the court, "to pay the debt and costs to the clerk of the court, at his office, forthwith, &c. Attendance from ten till four." The defendant having refused to pay, the bailiff took his goods in execution:—*Held*, that the verbal order to pay was in effect a judgment, and therefore no service of the order was necessary before execution.—*Somble*, that where an order is made by the judge, and afterwards varied as to the time of payment, it must be drawn up and served, before execution can issue. *Ely v. Moule*, 918

COVENANT.

See CONDITION PRECEDENT, 1, 2.

DAMAGES.

LANDLORD AND TENANT.

PLEADING, II. (6).

(1). Alternative Covenant.

By indenture the plaintiff granted to the defendant, for a term of years, the exclusive licence to use a patent, upon payment of certain sums by way of royalty. The indenture contained a covenant for payment of the royalty, and also the following:—"And it is hereby agreed, that if it shall happen in any year during the continuance of the term that the royalties or sums of money hereinbefore covenanted to be paid shall not a-

mount to the sum of 2000*l.* sterling, then and in every such case, and as often as the same shall so happen, the defendant shall, within fourteen days after the expiration of any year in which it shall so happen, pay to the plaintiff such a sum of money as with the royalty hereby reserved will amount to 2000*l.* for that year; or if the defendant shall, at any time, make default in payment of such sum of money aforesaid, within the time appointed for payment, then it shall be lawful for the plaintiff, by writing signed by him, and indorsed on the said indenture or duplicate thereof, to declare that the said indenture, and the powers and licence thereby granted, shall cease and determine:—*Held*, that this was not an absolute covenant, on the part of the defendant, to pay 2000*l.* a year during the term, but an alternative covenant, enabling the plaintiff to put an end to the licence on non-payment of that sum by the defendant. *Tielens v. Hooper*, 830

(2). *Not to Sue.*

A declaration stated, that an action had been commenced by the public officer of a banking copartnership against T., for the recovery of the amount of a bill of exchange drawn by him upon and accepted by the defendant for 1250*l.*; that, while the action was pending, it was agreed between the Company, T., and the defendant, that the action should be settled as follows:—250*l.* and 500*l.* by the promissory notes of T., and 500*l.* by the defendant's promissory note at twelve months, the defendant consenting to the Company's appropriating the securities held by them to the payment of such balance, and the defendant agreeing to give them a power to sell the properties mentioned in the securities, the Company to forego all interest on receiving the

three notes, and to guarantee to give up the bill sued on, and the 1000*l.* bill received on account of the said bill. The declaration then stated mutual promises, and averred that the Company had performed all things on their part to be performed, and had always been ready and willing to settle the action, &c. Breach, that the defendant did not nor would give the Company the promissory note for 500*l.* nor the said power of sale. Plea, that the defendant entered into the agreement jointly with M., B., and J.; and that, after breach of the agreement, by an indenture made between the nominal plaintiffs in this action (one of whom was the public officer of the Company) of the first part, the directors of the Company of the second part, the defendant, M., B., and J., of the third part, and T. of the fourth part, the public officer, on behalf of the Company, did remise, release, and for ever discharge the said M., B., and J., of and from the said action, and all actions and suits, causes of action, and debts whatsoever, without the consent of the defendant, and thereby released the defendant from the same:—*Held*, first, that the indenture set out in the plea did not operate as a release, but only as a covenant not to sue.

Secondly, that the agreement set out in the declaration was a binding engagement and not a mere accord, inasmuch as it would have been broken if the Company had proceeded with the original action, a new person having been made a party to the contract. *Henderson v. Stobart*, 99

DAMAGES.

Covenant on an agreement made the 27th September, 1848, whereby the defendant agreed to demise to the plaintiff, on or before the 29th November then next, a ferry and cer-

tain messages and premises, at yearly rents; and the defendant thereby agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the several premises, and deduce a good title thereto; and the plaintiff agreed to pay to the defendant, on or before the 29th November, 3150*l.* and interest. Averment, that the plaintiff was always ready and willing to perform all things in the agreement on his part to be performed. Breach, that the defendant did not within fourteen days, or at any time, deduce a good title. Pleas, that the plaintiff was not ready and willing to perform all things on his part to be performed; and that the defendant did deduce a good title. It appeared that, on the 17th September, 1850, the plaintiff, who was a solicitor and the promoter of a Company for making a ferry, erecting gas-works, bathing houses, &c., at Hayling Island, entered into an agreement with the defendant, the owner of land there, for a demise to the plaintiff of a ferry, land, houses, and premises; and the defendant agreed, within fourteen days from the date thereof, to furnish an abstract of his title to the premises, and deduce a good title thereto; and the plaintiff agreed to pay the defendant, on or before the 29th November, 3150*l.* After the agreement, the Company was provisionally registered by the plaintiff as its promoter. Two abstracts of title were sent by the defendant to the plaintiff, which being objected to, on the 10th November the defendant sent a further abstract, which disclosed a mortgage of the premises intended to be demised to the trustees of the defendant's marriage settlement, one of whom was imbecile: there were also two judgments entered up against the defendant. In consequence of these objections to the title, the association could not pro-

ceed with its objects, and was finally dissolved. The 3150*l.* was not paid to the defendant:—*Held*, that the plaintiff was entitled to a verdict on the above issues, and to recover as damages the costs of preparing, stamping, and entering into the agreement, the expenses of investigating the title, and endeavouring to procure a good title, and procure the lease to be granted; but not the expenses of raising the 3150*l.*, and loss of interest; nor the expenses of preparing the Company's deed of settlement and registering it provisionally, nor the loss of profits from the granting of the lease and the establishment of the association, nor the profits he would have derived from being employed as solicitor by the association, nor as to any advantage which he might have derived from his time, labour, &c., bestowed in the formation of the association. *Hanslip v. Padwick*, 615

DEBT.

See PLEADING, I. (1).
RAILWAY COMPANY, (2).

DE INJURIA.

See MASTER AND SERVANT, (1).
PLEADING, II. (4).

DELEGATES.

See PRIVY COUNCIL.

DEVISE.

(1). *Estate in Fee Simple.*

A testator devised as follows:—
"I give to my grand-daughter S., her heirs, executors, and administrators for ever, that dwelling-house in Tavistock-street, No. 3, in the borough of Plymouth. I also give to S. that dwelling-house and garden situate behind the above-named dwelling-house, and in the occupation of C.

I also give to S. that other dwelling-house and garden situate in York-street, No. 30, the whole of which premises are in the borough of Plymouth, during her natural life; but should S. marry and have children, then, after her decease, the before-mentioned houses to descend to her children; but should S. die without issue, then the said premises to become the joint property of the children of B. I also give, provided S. dies without issue, the sum of 100*l.* to J., to be paid to him out of the before-mentioned premises."—*Held*, that S. took an estate in fee simple in the first-mentioned house; and therefore, upon her death without issue, the children of B. were entitled only to the two other houses. *Doe d. Bailey v. Sloggett*, 107

(2). *Meaning of Words "Same Estate and Interest."*

J. D. at the time of making her will was entitled to two freehold estates, one in the county of Westmoreland, and the other in the county of Berks, and also two copyhold estates, one called Hempstead, and the other Cock Coms. In 1778, J. D. made her will, and devised her freehold estate, after certain life estates, to her great nephew T. B. for life, then to his issue for their respective lives, remainder to his brother H. B. for life, then to his issue for their respective lives, and then to S. E. for life and her issue, remainder to the right heirs of the testatrix. She devised the copyhold estate of Hempstead, after certain life estates, to H. B. for life, remainder to his issue, remainder to T. D.; and the copyhold estate of Cock Coms, after the same life estate, to H. B. for life, remainder to his issue, remainder to R. D. The freehold estate in the county of Berks the testatrix devised, after certain life estates, to T. B., remainder to his issue

for their respective lives, remainder to his brother H. B. and his issue in like manner, remainder to S. E. for life and her issue, and then, with limitations over in strict settlement, to certain collateral relations of the testatrix. In 1784, the testatrix made the following codicil: "And whereas I have in and by my said will, in the disposition I have therein made of my share of the real estates in the county of Westmoreland, after the several limitations in favour of my great nephew T. B. shall be spent, limited the same precisely in the same manner to his brother H. B., I do hereby confirm the same, and further declare my mind and will to be, that, in the next disposition made in my said will of and to my share of the several copyhold estates of Cock Coms, &c., the said T. B. shall, after the limitations in favour of his brother H. B. shall be spent, have precisely the same estate and interest therein, before the subsequent limitations to T. D. and R. D. shall respectively take place, as the said H. B. hath in and by my said will in the estates in the said county of Westmoreland; and I do hereby give and devise the copyhold estate which I lately purchased of the widow K., and which, after my admittance to the same, I surrendered to the use of my will, to the said H. B., with the like limitations over as are contained in my said will and this codicil concerning my other copyhold estates in the said county of Hertford or elsewhere:"—*Held*, that, according to the true construction of this codicil and will, the copyhold estate of Cock Coms was devised to T. B. and his issue for life. *Grover v. Burningham*, 184

(3). *When Leaseholds pass by General Devise of Real Estate.*

A testator, by will made in 1815, after giving certain legacies, bequeath-

ed "all the rest, residue, and remainder of his personal estate, goods, and chattels, whatsoever and wheresoever," subject to the payment of his debts and legacies, to D. "absolutely, to and for his own use and benefit." The testator further devised "all and singular his manors, rectories, advowsons, messuages, lands, tenements, tithes, and hereditaments, situate, lying, arising, or being at or near Windlestone, in the county of Durham, and *"all other his real estate"* in the said county, "and all his estate and interest therein, to trustees, to the use of D. for life, and after his decease to the use of the first and other sons of D. in tail male." D. died in the lifetime of the testator, who, in 1841, made a codicil, whereby he appointed another executor, and ratified, confirmed, and re-published his will. The testator, at the time of his death, was possessed of both freehold and leasehold estates in the county of Durham:—*Held*, that the will, having been re-published by the codicil, must, according to the provisions of the 34th section of 1 Vict. c. 26, be deemed to have been made at that date; and therefore, by virtue of the 26th section, the leaseholds passed to the trustees under the general devise of the real estate, no contrary intention appearing on the face of the will. *Wilson v. Eden*, 752

DUPLEX QUERELA.

See PRIVY COUNCIL.

ESTOPPEL.

See RELEASE.

In trover for paper, it appeared that the plaintiff and defendant had been in partnership together as paper manufacturers and iron merchants. The partnership was dissolved by a deed, which recited, that it had been agreed that the business of a paper

manufacturer should belong exclusively to the defendant, and the business of an iron merchant to the plaintiff; but that the plaintiff should receive out of the stock, paper to the value of 898*l.* 4*s.* 11*d.*, which should remain in the paper mill for a year, at his option. The deed also recited, that in performance of that arrangement *paper to the value of 898*l.* 4*s.* 11*d.* had been delivered to the plaintiff*, and the same was then in the mill, as the plaintiff acknowledged. It was then witnessed, that in performance of the arrangement the plaintiff and defendant dissolved partnership, and the plaintiff assigned to the defendant the stock in trade of the business of a paper manufacturer, except the 898*l.* 4*s.* 11*d.* worth of paper *so delivered to the plaintiff as aforesaid*, and the defendant assigned to the plaintiff the stock in trade of the business of iron merchants: there were also mutual releases. No paper whatever was set apart or delivered to the plaintiff, but the jury found that the defendant had converted the whole stock:—*Held*, first, that the parties were estopped by the deed, to say that no such delivery had taken place; secondly, that as the defendant had converted the whole, the plaintiff might maintain trover for his share of the stock, although no specific portion had been set apart for him. *Wiles v. Woodward*, 557

EVIDENCE.

See ATTORNEY, (2).

BANKRUPT.

MASTER AND SERVANT, (1), 2.

PLEADING, III. (2).

RAILWAY COMPANY, (3).

TOLL, (1).

(1). *Of Title by Payment of Rent.*

The payment of rent by a tenant to an authorised agent, who pays over the rent to his principal, is evi-

dence as against the tenant of the principal's title, although the agent do not disclose his principal's name at the time.

Where A. had paid rent to B., the agent of C. & D., and the property for which the rent was paid was subsequently conveyed to C. & E., and A. still paid the rent to B., but was not informed by the latter of the change, and B. paid over the rent to C. & E.:—*Held*, that the payment so made was some evidence of the title of C. & E. to the property; and that, under such circumstances, there was no necessity (in an action of replevin by A. against parties claiming under C. & E.) for the proof of the conveyance to C. & E. *Hitchings v. Thompson*, 50

(2). *Of Conversion in Trover.*

B., having contracted with a Railway Company to set up the fencing of their line, employed G. to supply posts and rails for a part of the line. B. became bankrupt, and a quantity of the unfixed fencing was removed by G.'s direction to an adjacent field, and sold to the plaintiff. This fencing was afterwards carried back to the railway by labourers acting under the direction of an over-looker of the Company. G. asked the men upon what authority they removed the fencing, and was told to apply to the engineer of the Company. G. afterwards saw one of the directors of the Company, who told him to attend a meeting of the Company. G. went to the office of the Company for that purpose, and was told by the same director, that there was a prospect of an amicable arrangement with B., and that all claims on the line would be paid. A demand was afterwards made upon the secretary of the Company, who stated that he was not the party on whom the demand ought to be made:—*Held*, in trover against the Company, that there was no evidence of a con-

version by them. *Glover v. The London and North Western Railway Company*, 66

(3). *Of Legal Parochial Chapelry.*

Under the 1 & 2 Will. 4, c. 38, s. 14, by which the fees, dues, offerings, or emoluments, of right or custom belonging to the incumbent of the parish, *chapelry*, or place in which the newly erected church is situate, are to be received on account of such incumbent, except such part as the commissioners, with the consents of the bishop, the patron, and the incumbent in some cases, and the bishop alone, with the consent of the patron and incumbent, in others, shall assign to the minister of the district church,—the term "*chapelry*" means a legal parochial chapelry, and therefore one which is immemorial.

Upon a trial, where the question was, whether the chapelry of St. H. was a legal parochial chapelry—*Held*, that the statement of a witness, that he had heard from a former incumbent of St. H. that the people of four townships and another parish came to the chapelry, was admissible in evidence, inasmuch as the rights of the chapel in question were sufficiently of a public nature to make reputation admissible.

So, a case stated by a deceased incumbent of St. H. for the opinion of a proctor, with his opinion thereon, was held admissible, on the same principle as the statement of a deceased occupier, which qualifies his estate, is admissible.

Held, also, that the answer of the incumbent of St. H., and other clergymen, to questions sent by the Bishop of C., the diocesan, for the information of the Governors of Queen Anne's Bounty, at the time an augmentation was made, was admissible, as being in the nature of an inquisition on a public matter. *Carr v. Mostyn*, 69

(4). *In Action for Railway Calls.*

In an action for railway calls, the plaintiff proved that it was the course of business for C., a clerk, to fill up printed notices of the calls and direct them to the shareholders, and then to put the notices into a basket; and it was the practice for another clerk to post the letters which were in the basket, which he had done on this occasion. C. was dead, but a list of shareholders, containing the name of the defendant, was produced in his handwriting, and indorsed by him "Letters sent out." C. had received instructions to make out such list, and had been seen filling up and directing the notices, with such a list before him:—*Held*, that the list so indorsed was admissible as evidence that notice of the call had been sent to the defendant, notwithstanding it was not distinctly shewn when the indorsement was made. *The Eastern Union Railway Company v. Symonds*, 237

(5). *Of Foreign Law.*

A witness, whose knowledge of the law of a foreign country is derived solely from his having studied it at an university in another country, is incompetent to prove what the law of that foreign country is.

A document which, by the law of a foreign country, is not admissible in evidence for want of a stamp, may, nevertheless, be admitted in this country. But where, by the foreign law, the want of a stamp renders the contract void, it cannot be enforced here.

In order to prove that a certain Company for working mines in Westphalia had never been finally constituted, the plaintiff proved, by the solicitor of the Company in this country, that nothing had been done here towards its final constitution:—*Held*, that, in the absence of any evidence

on the part of the defendant, the jury were warranted in finding that the Company never was finally constituted. *Bristow v. Sequeville*, 275

(6). *In Action on Contract with Joint-stock Company.*

1. In an action by the plaintiffs for work done as engineers for a Railway Company, of which the defendant was a member of the provisional committee, the plaintiffs gave in evidence certain resolutions of the committee, made at meetings at which the defendant was present. The defendant offered in evidence a resolution, to the effect that engineers should be employed, but that the members of the provisional committee were not to incur any personal responsibility; but at that meeting the plaintiffs were not present:—*Held*, that the resolution was receivable in evidence. *Rennie v. Clarke*, 292

2. The plaintiff having brought an action against A. B. for goods supplied to a joint-stock Company, of which the defendant was a member, and the action having been stayed under the Winding-up Act, 11 & 12 Vict. c. 45, until the plaintiff should prove his claim before the Master (which he failed to do), he obtained an order to be allowed to proceed in the action, and to substitute C. D., the official manager of the Company, as defendant in lieu of the then defendant. The plaintiff thereupon entered a suggestion on the record, which stated that "the action was commenced and had hitherto been prosecuted against A. B., as a person authorised to be sued as *the nominal defendant*, on behalf of the Company:—*Held*, that the acts of A. B. were not admissible in evidence on the trial of the cause against C. D., as the plaintiff's suggestion alleged that A. B. had been sued as a mere nominal defendant. *Armstrong v. Normandy*, 409

3. Under the 8 & 9 Vict. c. 16, s. 28, the register of shareholders, having thereon the seal of the Company, is admissible in evidence, without proof that the seal was duly affixed to the document at an ordinary meeting of the Company, in pursuance of the provisions of the 9th section of the Act. *The London and North Western Railway Company v. M'Michael*, 855

4. A declaration against a Railway Company stated, that the plaintiff, at the request of the defendants, became a passenger in one of their trains, to be carried for &c., for reward to them, &c.; that, through the carelessness, negligence, and improper conduct of the defendants, the train in which the plaintiff was such passenger, struck against another train, whereby the plaintiff was injured. At the trial, it appeared, that the train in question had been hired of the Company by a benefit society for an excursion, the tickets for which were sold and distributed by the treasurer of the society, from whom the plaintiff purchased one; and that the accident was occasioned by the train in which the plaintiff was, running against a train standing at the station, it being then dark:—*Held*, first, that the mere fact of the accident having occurred was *prima facie* evidence of negligence on the part of the defendants. Secondly, that there was evidence for the jury that the plaintiff was a passenger to be carried by the defendants. *Skinner v. The London, Brighton, and South Coast Railway Company*, 787

(7). *Under General Issue.*

In an action for work and labour, to which the defendant pleads the general issue, a statement made by the plaintiff, that the claim which forms the subject of the action was referred to an arbitrator, who found

VOL. V.

by his award that nothing was due to the plaintiff, is evidence against the plaintiff under the issue raised by that plea. *Murray v. Gregory*, 468

(8). *In Action for Libel.*

In an action of libel, charging the plaintiff with having in a letter published a libel upon the defendant, to which the defendant pleads that the plaintiff did in fact publish the libel in question; letters, not otherwise evidence in the cause, written by the plaintiff, and in which the defendant's name was spelt in a peculiar manner, were held admissible as evidence that the libel in question, which contained the defendant's name spelt with the same peculiarity, was written by the plaintiff. *Brookes v. Tichborne*, 929

EXECUTION.

See BANKRUPT LAW CONSOLIDATION ACT, (2).
COUNTY COURT, (2).

EXECUTOR.

See PLEADING, I. (5), 2; II. (1).

EXTORTION.

See PLEADING, I. (3).

FEME COVERT.

See HUSBAND AND WIFE.

FIAT IN BANKRUPTCY.

The 5 & 6 Vict. c. 122, s. 4, enacts, that fiats in bankruptcy shall be issued and transmitted by the Lord Chancellor's Secretary of Bankrupts, in such manner as the Lord Chancellor shall by any order direct. The Lord Chancellor, by an order, directed that every fiat directed to any District

T T T

EXCH.

Court of Bankruptcy should forthwith be sent through the General Post Office to the deputy registrar or registrars of such District Court. A fiat in bankruptcy having been signed by the Lord Chancellor, and sent to the office of the Secretary of Bankruptcy, was by him duly put into the post, and arrived at the District Court on the following day:—*Held*, that the fiat issued at the moment it was put into the post. *Hernaman v. Coryton*, 453

FOREIGN LAW.

See EVIDENCE, (5).

GRAMMAR SCHOOL.

By the provisions of a scheme for the management of King Edward the Sixth's Grammar School at Ludlow, duly confirmed by the Lord Chancellor, it was declared that the trustees should have authority, upon such grounds as they should, at their discretion, in the due exercise and execution of the powers and trusts reposed in them, deem just, from time to time to remove the master, usher, &c., from his office, subject, however, to certain formalities being observed:—*Held*, that these words conferred an absolute discretionary power upon the trustees, provided the formalities specified were followed; and that they were not bound to summon the master before them, or to give him any hearing or opportunity of defending himself against the charges which formed the ground of his removal.

By an order, the Lord Chancellor, in whom the power of appointing new trustees was vested, referred it to the Master to approve of eight fit and proper persons to be appointed trustees in lieu of those dead, or who had left the borough of L.; and after his report, such further order was to be

made as was just. The Master reported that he had approved of eight persons as fit and proper to be appointed &c. This report was confirmed; and, in the confirmation, the trustees of the charity (naming the said eight persons and the other trustees) were directed to pay the costs of the petition for the appointment of new trustees out of the surplus funds of the charity in their hands. By the private Act, the property of the trust was vested in the trustees for the time being, without any deed of transfer:—*Held*, that this was a valid appointment of the eight new trustees by the Lord Chancellor. *Doe d. Childs v. Willis*, 894

GRANT.

See PLEADING, III. (2).

GUARANTEE.

See BANKRUPT LAW CONSOLIDATION ACT, (4).
WARRANTY.

HABEAS CORPUS.

See INSOLVENT DEBTOR.

HUSBAND AND WIFE.

(1). *Husband's Right to Wife's Savings.*

A husband and wife separated by agreement (not under seal), and at that time he agreed to allow her a certain sum weekly for her support, which was paid; and she saved a certain portion of her allowance and invested it in stock; but a few days before her death she sold out the stock, and disposed of the proceeds by way of gift:—*Held*, that the husband was entitled to recover back the money so given, in an action for money lent, against the person who received it. *Messenger v. Clarke*, 388

(2). *Husband of Female Shareholder in Banking Copartnership.*

The defendant's wife dum sola became an original shareholder in a banking copartnership; after her marriage, but without the defendant's knowledge, she received dividends and paid calls in her maiden name, and in that name was returned to the Stamp Office as a shareholder, but never executed any deed of settlement. The defendant was aware that his wife was a shareholder, but never interfered in the matter, and, when applied to for a call, said he would have nothing to do with it. The deed of settlement provided, that the husband of any female shareholder should not be a member in respect of such shares, but might either dispose of the shares so vested in him, or at his option become a member on complying with certain requisitions:—*Held*, that the defendant was not a member of the Company for the purpose of execution against him by scire facias on a judgment against the public officer under the 7 Geo. 4, c. 46, s. 13. *Dodgson v. Bell*, 967

INCLOSURE ACT, 8 & 9 VICT.
c. 118.

See PLEADING, III. (2).

INFANT.

Liability for Railway Calls.

1. To a declaration for railway calls the defendant pleaded, that, at the time when he first became the holder of the shares, and at the time of his making the contracts, by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiff, and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call upon the

defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years. Replication, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years. It appeared at the trial, that the defendant was the purchaser of the shares in question whilst he was an infant, and that, after he was of full age, a call was made:—*Held*, that the term "contract," meant the contract by which the defendant became a shareholder, and not the obligation to pay the calls under the 8 & 9 Vict. c. 16, s. 21; and, consequently, the plea was proved by evidence of his infancy at the time of the transfer to him of the shares.

Quære, whether the word "contract," being so construed, the plea was an answer to the action. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Pilcher*, 24

2. To an action for calls on railway shares, the defendant pleaded that the Company, in pursuance of the defendant's application, granted the shares to him as the original holder thereof, and entered his name in the register of shareholders as the proprietor thereof, and so the defendant became and still is the original holder of the shares by contract with the Company, and not otherwise; that, when the shares were granted to him, and his name entered as aforesaid, and also at the respective times of making the calls, the defendant was an infant; that he never ratified or confirmed the said application, grant, entry, and proprietorship, but the same have hitherto remained wholly unratified and unconfirmed; that he has not at any time derived any profit, benefit, or advantage whatsoever from the shares or by reason of his

being the proprietor thereof, and such proprietorship has always been wholly unprofitable and useless to the defendant:—*Held*, on general demurrer, that the plea was bad for want of an averment that the defendant had repudiated the contract, or, at least, that he continued a minor.

Semble, that an infant, even in the case of a lease which is disadvantageous to him, cannot protect himself, if he has taken possession and has not disclaimed; at all events, unless he still continues a minor. *The North Western Railway Company v. M'Michael*, 114

3. Where nothing but the simple fact of infancy is pleaded to an action for railway calls against a purchaser who has been registered, and thereby become a shareholder in a permanent character, the interest continuing to be vested in the infant, and the subsequent obligation to pay, such a plea is insufficient. Therefore, where, to a declaration for railway calls, the defendant pleaded, that, at the time when he first became the holder of the shares, and at the time of his making the contracts by force of which the debts, causes of action, and liabilities in the declaration mentioned accrued to the plaintiffs and were incurred by the defendant, and at the time of his making and entering into the contracts by force of which the plaintiffs claim to be entitled by law to make the call upon the defendant, as in the declaration alleged, the defendant was an infant within the age of twenty-one years: to which the plaintiffs replied, that the defendant, at the time when he first became the holder of the shares, and at the time of his making the contracts in the plea mentioned, was of the full age of twenty-one years; upon which issue was joined, and a verdict entered for the defendant:—*Held*, that the plaintiffs were entitled to judgment non obstante veredicto. *The Birkenhead*,

Lancashire, and Cheshire Junction Railway Company v. Pilcher, 121

INSOLVENT ACT, 1 & 2 VICT. c. 110.

See BILL OF SALE
PRACTICE, (2).

Under the 69th section of the Insolvent Act, 1 & 2 Vict. c. 110, the words "debts growing due" mean debts ascertained and payable in futuro. *Skellon v. Mott*, 231

INSOLVENT DEBTOR.

A warrant or order under the 1 & 2 Vict. c. 110, issued out of the Insolvent Debtors Court, dated 8th of April, 1850, was directed to the keeper of the Queen's Prison, and ordered that a prisoner therein named should be "discharged forthwith as to the detainer of S.," and, as to the detainer of H., "at the period of three calendar months from the 7th of January, 1850," (the date of the vesting order):—*Held*, that the instrument was, in effect, an order to the gaoler to discharge the prisoner *forthwith*, and that he was bound to obey the order:—*Held*, also, that such order was a good defence to an action for not bringing up the party under a habeas corpus, delivered to the keeper before he had discharged the party, but returnable after such discharge:—*Held*, also, that such defence was admissible under a plea of not guilty "by statute," under the 110th section of the 1 & 2 Vict. c. 110.

Quære, whether an adjudication of the Insolvent Debtors Court, in a form similar to that of the warrant, is good. *Harvey v. Hudson*, 845

JOINT-STOCK COMPANY.

See DAMAGES.

EVIDENCE, (4), (6).

PARTIES TO ACTION, 2.

PLEADING, I. (4).

RAILWAY COMPANY.

WINDING-UP ACT.

JUDGE'S ORDER.

Scire Facias.

A scire facias may be obtained at the suit of a creditor against a shareholder in a Joint-stock Company, under the 36th section of the 8 & 9 Vict. c. 16, (the Companies Clauses Consolidation Act):—*Quære*, whether that is the sole remedy.

Where a Company was established for the purpose of making a railway in Ireland, and the plaintiff had recovered judgment against the Company, and had issued a writ of fi. fa. into the county of Surrey, to which there was a return of nulla bona, and had issued a testatum fi. fa. into Middlesex, to which writ there was a like return, but he had not taken any means to levy execution in Ireland, the Court made the rule absolute to issue a scire facias against a shareholder of the Company, who, as chairman and director of the Company, stated at a general meeting of the body, that the Company had no funds to meet the claims against the Company, one of those claims being the judgment debt of the plaintiff. *Devereux v. The Kilkenny and Great Southern and Western Railway Company, In re Emery*, 834

JUDGE'S ORDER.

See BANKRUPT LAW CONSOLIDATION ACT, (3).

Security for Costs.

A defendant obtained a Judge's order in the following terms:—"It is ordered that the plaintiff do *forthwith* give security for costs to the satisfaction of the Master, no stay of proceedings in the meantime, the attorney for the plaintiff hereby undertaking to find such security:"—*Held*, that the proper construction of the order was, that the attorney should give the security in case further proceedings were taken, and, therefore,

LANDS CLAUSES &c. 1003

that he was not liable to an attachment for not giving the security, no further proceedings having been taken. *Hill v. Fletcher*, 470

JUDGMENT.

See COUNTY COURT, (2).

JUDGMENT NON OBSTANTE VEREDICTO.

See INFANT, 3.

PLEADING, I. (4); II. (7).

LANDLORD AND TENANT.

See CONDITION PRECEDENT.

EVIDENCE, (1).

USE AND OCCUPATION.

The receipt of rent is no waiver of a continuing breach of covenant. Therefore, where a lessee was bound, under penalty of forfeiture, to repair within a reasonable time, and after breach the lessor accepted rent:—*Held*, that the reasonable time for reparation did not commence afresh after such acceptance of rent. *Doe d. Baker v. Jones*, 498

LAND TAX.

The Court of Exchequer has no jurisdiction to order the Commissioners of Land Tax to cause the proportion charged upon a division to be equally assessed. *In re Holborn Land Tax Assessment*, 548

LANDS CLAUSES CONSOLIDATION ACT, 8 & 9 VICT. c. 18.

See ARBITRATION, (2).

(1). *Adjudication of Costs of Arbitration.*

Under the 34th section of the Lands Clauses Consolidation Act, (8

& 9 Vict. c. 18), which provides that all the costs of arbitration on the amount of compensation to be given for lands required to be taken by a public Company are to be settled by the arbitrators, such costs need not be incorporated in the award, but may be ascertained at a subsequent time by the persons who made the award.

Such adjudication of the costs need not be within three months after the time of the reference.

The term "the arbitrators" in that section may mean either the arbitrators or umpire, according as the compensation shall have been determined by the arbitrators or umpire.

In an action for the recovery of compensation awarded and the costs, the declaration stated that the umpire was required by the plaintiff to settle and determine the costs to be paid to him under that Act:—*Held*, on special demurrer, that the averment amounted to a statement that the umpire was required to adjudicate upon the costs, and was sufficient. *Gould v. The Staffordshire Potteries Waterworks Company*, 214

(2). *Lands "taken" for the Execution of the Works.*

The words "lands which shall have been taken for or injuriously affected by the execution of the works," in the 68th section of the Lands Clauses Consolidation Act, (8 & 9 Vict. c. 18), include such lands only as are *actually* taken or *actually* affected by the works.

A., the proprietor of certain houses, which were liable to be taken for making a Railway, under the provisions of the local Act of the promoters of the undertaking, received a notice under the 18th section of the 8 & 9 Vict. c. 18, from the promoters, that the property would be required by them for the Railway, and the notice demanded the par-

ticulars of A.'s interest therein, and stated their willingness to purchase it. A. duly furnished these particulars, and a sum of 4500*l.* was set upon the property by him, which amount he claimed from the promoters as a compensation for taking the property; and he required payment thereof, or that a warrant should be issued by the Company, to summon a jury to assess the proper amount, under the provisions of the Act. The Company took no further step in the matter:—*Held*, that, under these circumstances, A. could not maintain an action to recover from them the 4500*l.* *Burkinshaw v. The Birmingham and Oxford Junction Railway Company*, 475

LESSOR AND LESSEE

See CONDITION PRECEDENT, 2.
LANDLORD AND TENANT.
USE AND OCCUPATION.

LIBEL.

See EVIDENCE, (8).

LONDON POLICE ACT.

A police constable of the city of London has no power, under the 2 & 3 Vict. c. xciv. to take a person into custody without warrant, merely on suspicion that he has committed a misdemeanor. *Bowditch v. Balchin*, 378

LORD CHANCELLOR

See GRAMMAR SCHOOL.
TRIAL AT BAR.

LOTTERY ACTS.

See BANK ACT.

MALICIOUS ARREST.

See PLEADING, I. (6).

MARKET.

A person who exposes goods for sale in a public market has a right to occupy the soil with baskets necessary and proper for containing the goods.

Trespass for taking the plaintiff's goods, to wit, potatoes, baskets, &c. Pleas, first, that W. was possessed of a close, called May Day Green, and because the goods were wrongfully upon the close, incumbering the same, the defendants, as the servants of W., took the goods and removed them:—secondly, that T. was possessed of a close, part of land called May Day Green, and because the goods were wrongfully upon the last-mentioned close, incumbering the same, the defendants, as the servants of T., removed them. Replication to first plea, that a market was held upon the close in which &c., for the buying and selling of provisions, and the plaintiff brought into the close in which &c., into the market, the potatoes, for the purpose of selling the same, and also then brought the baskets, being necessary and proper for holding and containing the same, being no inconvenience to the holding of the market, when the defendants of their own wrong seized them. The replication to the second plea was in similar terms. Rejoinder to replication to first plea—That A., being seised in fee of the close called May Day Green, and also of the market, demised the close to W.; and because the goods were wrongfully on the close, the defendants, as the servants of W., took and removed them. Rejoinder to replication to second plea—That A., being seised in fee of May Day Green, and also of the market, which was held as well upon the close in the second plea mentioned, as upon other parts of May Day Green, demised to W. the said close and other parts of May Day Green; that W. demised the close, being such part of May Day

Green, to T. for the purpose of erecting a stall thereon for selling goods in the market, the said close not being an unreasonable quantity of land for that purpose, and there being sufficient ground left for other persons resorting to the market; and because the goods were wrongfully placed on the close without the leave of T., the defendants, as her servants, took the goods and removed them:—*Held*, on demurrer, that the rejoinders were bad, inasmuch as the demise to W. was subject to the right of market.
Townend v. Woodruff, 506

MARRIAGE

See ASSUMPSIT.

MASTER AND SERVANT.

(1). *Action for wrongful Discharge.*

1. To an action for wrongfully discharging the plaintiff from the defendant's service as a traveller and salesman, the defendants pleaded that the plaintiff refused to obey the lawful and reasonable commands of the defendants with reference to the plaintiff's conduct and proceedings in the said employ, and that the plaintiff received from divers customers of the defendants divers monies which he wrongfully appropriated to his own use; wherefore the defendants did, by reason of the premises, refuse to continue the plaintiff in their employ, and therefore discharged him. Replication, *de injuriâ*. At the trial, it was proved that the plaintiff had misappropriated the defendants' monies, but the fact of such misappropriation was not known to the defendants until after they had discharged the plaintiff:—*Held*, that, the defendants having justifiable cause for discharging the plaintiff, the learned Judge was wrong in leaving it to the jury to say whether they discharged

him for that cause, for that their motive and intention was not in issue under the replication de injuriâ. *Spotswood v. Barrow*, 110

2. In an action of assumpsit brought by the plaintiff, a servant, for dismissing him during the period for which he was hired, the declaration stated that the defendant refused to permit the plaintiff to continue in his service during the term, and wrongfully dismissed him therefrom. Plea, that, after the making of the agreement, and before the discharge and dismissal, the plaintiff conducted himself in an improper and disobedient manner, and disobeyed the defendant's lawful orders; *without this*, that the defendant wrongfully dismissed and discharged the plaintiff without reasonable cause; concluding to the country. Issue thereon:—*Held*, that, although the plea might be bad on special demurrer, as putting in issue an immaterial allegation in the declaration, yet, as issue had been taken on the plea, the plaintiff's misconduct, as well as the fact of his dismissal, were in issue, and consequently that evidence of such misconduct offered at the trial by the defendant was improperly rejected, and that the onus of such proof lay on the defendant. *Lush v. Russell*, 203

(2). *Liability of Master for Injury to Servant by Negligence of Fellow-servant.*

1. A master is not responsible to his servant for injury occasioned by the negligence of a fellow-servant in the course of their common employment, provided the latter be a person of competent care and skill.

Therefore, where a servant of a Railway Company, in discharge of his duty as such, was proceeding in a train under the guidance of others of their servants, through whose negligence a collision took place, and he

was killed:—*Held*, that his representative could not maintain an action against the Company under the 9 & 10 Vict. c. 93; and that it made no difference in this respect whether the accident was occasioned by the negligence of the servants guiding the train in which the deceased was, or of those guiding the other train, or of both. *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 343

2. The defendant, a master builder, having contracted to build a certain building, employed W. as a bricklayer. The scaffolding was erected under the superintendence of the defendant's foreman, the defendant not being present, and was constructed by men in the employ of the defendant, who used an unsound ledger pole, in consequence of which the scaffold broke while W. was at work upon it, and he was thrown to the ground and killed. The unsoundness of the pole had been previously pointed out to the foreman:—*Held*, that no action could be maintained against the defendant under the 9 & 10 Vict. c. 93, there being no evidence that the foreman was an improper person to employ for that purpose. *Wigmore v. Jay*, 354

(3). *Liability of Sub-Contractor for Injury caused by the Negligence of his Servant.*

A Railway Company entered into a contract with A. to construct a portion of their line. A. contracted with B, who resided in the country, to erect a bridge on the line. B. had in his employment C., who acted as his general servant and as a surveyor, and had the management of B's business in London, for which he received an annual salary. B. entered into a contract with C., by which C. agreed for 40*l.* to erect a scaffold, which had become necessary in the building of the

bridge; but it was agreed that B. was to provide the requisite materials, and lamps and other lights. The scaffold was erected upon the footway by C.'s workmen, and a portion of it improperly projected; and owing to that and the want of sufficient light, D. fell over it at night, and was injured. After the accident, B. caused other lights to be placed near the spot, to prevent the recurrence of similar accidents:—*Held*, that an action was not maintainable by D. against B. for the injury thus occasioned. *Knight v. Fox*, 721

MEASURES.

Under the 5 & 6 Will 4, c. 63, s. 21, earthen vessels are liable to seizure if ordinarily used as measures, and if on examination they are found to be unjust. *Washington v. Young*, 403

MEMORANDA, 183, 719, 906.

MESNE PROFITS.

A mortgagee out of possession, who gives notice of the mortgage to the tenant who has occupied since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice. The doctrine of relation applies only as between disseisor and disseisee, in which case the re-entry has relation back to prior occupation by the owner, and remits him to his original rights.

Where the mortgagee gave notice of the mortgage to the tenant in possession, who had become tenant since the mortgage, and made an entry, and subsequently served a notice of ejectment upon the tenant, who gave a judge's order, by which it was agreed that the action should be stayed upon the tenant's undertaking to give up possession of the premises on a day

named therein; and, in default thereof, the mortgagee was to be at liberty to sign final judgment, and to issue execution against the tenant for the whole costs of the action:—*Held*, first, that the mortgagee was not in a condition to maintain an action of trespass to recover the mesne profits from the date of the mortgage, inasmuch as he never had such a possession as is necessary to support the action; and secondly, that the Judge's order could not be considered as equivalent to a judgment by default in ejectment, or as any evidence of the mortgagee's prior occupation of the premises. *Litchfield v. Ready*, 939

MINE.

See PLEADING, I. (7).

MONEY HAD AND RECEIVED.

1. An action for money had and received will not lie by one tenant in common against his co-tenant, who has received more than his share of the profits. *Thomas v. Thomas*, 28

2. B., a partner in the firm of B., M., & Co., opened an account with certain bankers, in the partnership name. B. was one of the commissioners under an Act of Parliament for paving, &c., a township, who also had an account at the same bank and were considerably in arrear. The commissioners being desirous of a further advance, the manager of the bank wrote to B., offering to make it, on condition that he would not withdraw an equal amount of his account. B. wrote in reply, that he wished to have 5000*l.* advanced on those terms, adding, "I undertake not to remove my funds to the extent of this extra advance, until the same is repaid by the commissioners." The bank made the advance, and subsequently there was a balance on B.'s account of 4876*l.*: the extra

advance not having been repaid:—*Held*, that, assuming that this was a partnership account, B., M., & Co. could not recover the balance as money received for their use; and that this defence was available under the general issue. *Brownrigg v. Rae*, 489

3. A mercantile firm at Calcutta, by letter dated the 16th January, 1841, requested the defendants, their correspondents in London, to hold a sum of money, payable on the 19th November following, out of remittances and consignments on their general account, at the disposal of the plaintiff, a merchant at Liverpool, and a creditor of the Calcutta firm. On the same day the Calcutta firm wrote to the plaintiff informing him of the directions they had given to the defendants. On the 12th of March, 1841, the defendants wrote to the plaintiff "to advise" him of the request of the Calcutta firm, adding—"at the present time we are considerably in cash advance for the firm, and the consignments and remittances hitherto advised will, we think, fall short of the engagements we are under on their account. We have, however, registered the above, and should remittances or consignments come forward to enable us to meet their wishes, we shall lose no time in advising you." On the 14th March, 1841, the defendants wrote to the Calcutta firm in answer to their letter, that the state of their account would not warrant the defendants in meeting the requisition for the present; but should they be in a position to meet it before November they would do so. By letter of the 18th January, 1842, the Calcutta firm revoked their order for the appropriation of the money:—*Held*, that the correspondence did not create an absolute contract on the part of the defendants to pay to the plaintiff the amount in question out of the remittances and consignments; and

that, consequently, he could not sue them for money had and received for his use. *Malcolm v. Scott*, 601

MONEY LENT.

See HUSBAND AND WIFE, (1).

MONEY PAID.

The drawer of an accommodation bill cannot sue the acceptor for money paid to his use to the holder of the bill, unless not only the money paid pro tanto discharged the liability of the acceptor, but also the payment was made at his request, either express or implied. Therefore, where the plaintiff drew and indorsed for the accommodation of the defendant, the acceptor, a bill of exchange, which, when due, was dishonoured, and the plaintiff, without having received notice of dishonour, and without any request from the defendant, paid a part of the bill to the holder:—*Held*, that he could not recover the amount from the defendant in an action for money paid to his use; for there was no implied undertaking to indemnify against a payment which the drawer voluntarily made, with full knowledge that he was not bound to pay.

Quære, whether the same rule applies to cases where the legal obligation has been discharged by circumstances unknown to the drawer. *Sleigh v. Sleigh*, 514

MORTGAGE.

See ATTORNEY, (2).

MESNE PROFITS.

STAMP, 1.

STATUTE OF LIMITATIONS, (1).

TOLL, (1).

USE AND OCCUPATION, 2.

NEGLIGENCE

See EVIDENCE, (6), 4.

MASTER AND SERVANT, (2), (3).

NEGLIGENCE.

1. In an action for negligence, it appeared that the plaintiff was a passenger on an omnibus which was racing with the defendant's omnibus, and in trying to avoid a cart a wheel of the defendant's omnibus came in contact with the step of the omnibus on which the plaintiff was riding, which caused the latter to swing towards the kerbstone, and the speed rendering it impossible to pull up, the seat on which the plaintiff sat struck against a lamp-post, and he was thrown off:—*Held*, that the jury were properly directed, that the plaintiff was not disentitled to recover merely because the omnibus on which he sat was driving at a furious rate; and that, if the jury thought that the collision took place from the negligence of the defendant's omnibus, so that the other omnibus was not in fault in not endeavouring to avoid the accident, the defendant was liable. *Rigby v. Hewitt*, 240

2. A person who is guilty of negligence, and thereby produces injury to another, cannot set up as a defence, that part of the mischief would not have arisen if the person injured had not himself been guilty of some negligence.

Therefore, where the plaintiff, a passenger on board a steam-boat, was injured by the falling of an anchor, caused by the defendant's steam-boat striking the other steam-boat—*Held*, that it was improper to direct the jury, that, if they thought the collision was owing to the bad navigation of the defendant's steam-boat, they should find for the plaintiff, unless there was negligence, either in the stowage of the anchor or in the plaintiff putting himself in the place where he was, so as to lead or contribute to the mischief; in which case the plaintiff could not recover.

Quære, per *Pollock*, C. B., whether a person guilty of negligence is respon-

PARTIES TO ACTION. 1009

sible for all possible consequences of it, although they could not have been reasonably foreseen or expected. *Greenland v. Chaplin*, 243

NEW TRIAL.

An incorrect ruling at Nisi Prius, as to the proper party to begin, is no ground for a new trial, unless it also appears that substantial injustice has resulted from it. *Brandford v. Freeman*, 734

NIL DEBET.

See PLEADING, III. (3), 2.

OUTLAWRY.

Proceedings in outlawry cannot be founded on a *ca. sa.* returnable "immediately after the execution thereof." *Levy v. Hamer*, 518

OVERSEERS.

See PROMISSORY NOTE.

The 1st and 2nd sections of the stat. 11 & 12 Vict. c. 91, do not transfer the personal liability of overseers, for debts contracted for legal proceedings relating to parish business, to their successors in office. *Chambres v. Jones*, 229

PARTICULARS OF DEMAND.

See COUNTY COURT, (1).

PARTIES TO ACTION.

See BANKING COPARTNERSHIP.

(1). *Transferee of Bond, under 8 & 9 Vict. c. 16.*

The transferee of a bond, transferred to him under the provisions of the Companies Clauses Consolidation

1010 PARTIES TO ACTION.

Act, (8 & 9 Vict. c. 16), is the party in whose name an action upon the bond must be brought. *Vertue v. The East Anglian Railways Company*, 280

(2). *Secretary of Joint-stock Company.*

In covenant by the plaintiff as secretary of a Joint-stock Company, for calls, the declaration stated, that, by indenture made by and between the several persons whose names and seals were or might thereafter be thereunto subscribed, and who had sealed and delivered, or who might seal and deliver the same, of the first part; and W. and M., persons nominated to be covenantees for the benefit of the Company, of the second part; the parties of the first part covenanted with the parties of the second part, (inter alia), to pay the calls. Averment, that, whilst the defendant was a shareholder, "and after the execution by the defendant of the said indenture as aforesaid," the directors made a call. Breach, non-payment. The declaration contained no direct averment that the defendant executed the indenture. By the 4 & 5 Vict. c. xciii., after reciting that difficulties had arisen in legal proceedings by or against the Company, since, by law, all members must be named in such proceedings, and that it was expedient that the Company should be rendered capable of suing and being sued in the name of a nominal party, it was enacted, that, in all actions by or on behalf of the Company, it should be sufficient to proceed in the name of the secretary as the nominal plaintiff:—*Held*, on writ of error, first, that the statute authorised the *secretary* to sue on this covenant; and, secondly, that the words "after the execution by the defendant of the indenture as aforesaid," implied that the defendant had subscribed, sealed, and delivered the indenture; and that they were, upon

PATENT.

general demurrer, equivalent to such an averment. *Sutherland v. Wills*, 715

PARTNERSHIP.

See MONEY HAD AND RECEIVED, 2, 3.
STATUTE OF LIMITATIONS, (1).

PATENT.

See COVENANT, 1.

Specification—Combination of New and Old Machinery.

1. In the specification of a patent for "improvements in looms for weaving," the plaintiff declared that his improvements applied to that class of machinery called power-looms, and consisted "in a novel arrangement of mechanism, designed for the purpose of instantly stopping the whole of the working parts of the loom whenever the shuttle stops in the shed." He then described the manner in which that was done in ordinary looms, and proceeded thus:—"The principal defect in this arrangement, and which my improvement is intended to obviate, is the frequent breakage of the different parts of the loom, occasioned by the shock of the lathe or slay striking against the 'frog,' (which is fixed to the framing). In my improved arrangement the loom is stopped in the following manner:—I make use of the 'swell' and the 'stop-rod finger' as usual; the construction of the latter, however, is somewhat modified, being of one piece with the small lever which bears against the swell; but instead of its striking against the stop or 'frog' fixed to the framing of the loom, it strikes against a stop or notch upon the upper end of a vertical lever, vibrating upon a pin or stud. The lever is furnished with a small roller or bowl, which acts against a projection on a horizontal lever, causing

it to vibrate upon its centre, and throw a clutch-box (which connects the main driving-pulley to the driving-shaft) out of gear, and allows the main driving-pulley to revolve loosely upon the driving-shaft at the same time that a projection on the lever strikes against the 'spring handle,' and shifts the strap; simultaneously with these two movements the lower end of the vertical beam causes a break to be brought in contact with the fly-wheel of the loom, thus instantaneously stopping every motion of the loom without the slightest shock." After the date of the plaintiff's patent, the defendant obtained a patent for "improvements in and applicable to looms for weaving;" and amongst them he claimed a novel arrangement of apparatus for throwing the loom out of gear when the shuttle failed to complete its course. In the defendant's apparatus, the clutch-box was not used, but, instead of it, the stop-rod finger acted on a loose piece or sliding frog; and instead of a rigid verticle lever, as in the plaintiff's machine, the defendant used an elastic horizontal lever, and by reason of the pin travelling on an inclined plane, the break was applied to the wheel gradually, and not simultaneously. The jury found that the plaintiff's arrangement of machinery for stopping looms by means of the action of the clutch-box, in combination with the action of the break, was new and useful; also, that the plaintiff's arrangement of machinery for bringing the break into connection with the fly-wheel was new and useful; and that the defendant's arrangement of machinery for the latter purpose was substantially the same as the plaintiff's:—*Held*, upon these findings, first, that the specification was good; secondly, that the defendant had infringed the patent. *Sellers v. Dickinson*, 312

2. Where a patent is granted for a combination of several things, some of which are old and some new, the question of novelty depends upon whether that which is claimed in the specification as a whole is new.

And a person who, by some chemical or mechanical equivalent, imitates a part of such combination which is new and useful, is guilty of an infringement of the patent. *Newton v. The Grand Junction Railway Company*, 331

PAYMENT.

Goods were left by the plaintiff in the warehouse of E. & Co., at Huddersfield, for sale. The defendant, who resided in London, purchased a parcel of the goods, and remitted the price to the plaintiff. The defendants having afterwards purchased some more of the goods, received a letter from T., the clerk of E. & Co., inclosing an invoice and purporting to be written by E. & Co. by the procuration of the plaintiff, stating that they were authorised by the plaintiff to receive payment for him, and requesting the defendant to remit the money to them. The defendant accordingly remitted the amount by cheque, inclosed in a letter addressed to E. & Co., and which was delivered at their counting-house; but T. intercepted the letter, and appropriated the money to his own use. T. had authority from the plaintiff to receive money paid over the counter for goods sold in the warehouse, but in no other way:—*Held*, that the receipt by T. was no payment to the plaintiff. *Kaye v. Brett*, 269

PENALTY.

See REVENUE.

PLEADING.

See AGREEMENT.

CHARTER-PARTY, 2.

COUNTY COURT, (1), 2.

INFANT.

INSOLVENT DEBTOR.

LANDS CLAUSES CONSOLIDATION
ACT, (1).

MASTER AND SERVANT, (1), 1.

MARKET.

MONEY HAD AND RECEIVED, 2.

PARTIES TO ACTION, (2).

PRACTICE, (4).

STATUTE OF LIMITATIONS, (2).

USURY.

I. DECLARATION.

(1). *On Banker's Cheque.*

A declaration, after stating that the defendant was summoned to answer the plaintiff in an action of debt, alleged that the defendant made his draft or order in writing for the payment of money, called a banker's cheque, and delivered the same to the plaintiff, who still was the bearer thereof; that the cheque was presented at the Bank and not paid, whereof the defendant had notice, and then, in consideration of the premises, *promised the plaintiff to pay him the amount of the draft on request.* Then followed counts for goods sold and delivered, and on an account stated; concluding, "whereby, and by reason of the non-payment of the said several monies" *actio accrevit*, yet the defendant has not paid the sum above demanded:—*Held*, on motion in arrest of judgment, that the first count was a good count in debt, as the allegation of the promise might be rejected as surplusage.

Debt will lie against the maker of a banker's cheque, by the payee to whom the maker has delivered it.
Simpkins v. Potheary, 253

(2). *In Covenant.*

A declaration in covenant by the assignees of B., a bankrupt, stated that by a deed between B., of the first part; D. and S. his wife, of the second part; V. and the said B., described as trustees, of the third part; and the Thames Haven Dock and Railway Company, the defendants, of the fourth part; after reciting that certain persons on behalf of the Company had agreed to buy certain premises, and that B. had agreed to sell the same, it was witnessed, that, in consideration of a certain sum already paid to B., and in consideration of the further sum of 2936*l.* to be paid to B., and to V. and B., according to their respective rights and interests in the premises, on or before the 25th of March, 1844, B., D., S., and V. agreed to sell the premises; and that B. would, at his own expense, deduce a good title to the same; and that B., and all other necessary parties, would, on or before the said 25th of March, on payment by the Company of the said sum of 2936*l.*, at the costs and charges of the Company, execute and procure to be executed a proper conveyance for conveying the fee-simple of the premises; and that the Company thereby agreed with B. that they would, on or before the said 25th of March, and on the execution of such conveyance, pay the said sum of 2936*l.*, and until payment of the said sum would pay interest on the same to B. and his assigns; that the 25th of March had elapsed, and although B. before his bankruptcy, and the plaintiffs as his assignees after it, were willing and ready to deduce a good title, and though B. and the necessary parties were ready and willing, on payment by the defendants of the said sum of 2936*l.*, to execute a conveyance, and would have done so, but that the defendants discharged

B. and the plaintiffs from deducing such good title, and from executing such conveyance: the declaration then alleged as a breach, that the defendants did not prepare a proper conveyance, nor pay to B. or to the plaintiffs the sum of 2936*l.*, or any part thereof:—*Held*, on error, (affirming the judgment of the Court of Exchequer), on special demurrer to the declaration, first, that the assignees of a bankrupt, suing on a deed made to the bankrupt, are not bound to make proof of the deed; secondly, that the breach, that the defendants had not prepared the conveyance nor paid the money, was good; for, as the deed provided that the conveyance was to be at the costs and charges of the defendants, it lay on them to prepare it; thirdly, that the execution of the conveyance and the payment of the money were concurrent acts; but that the deduction of a good title by B. was necessarily a condition precedent to the preparation of the conveyance, as the conveyance could not be properly prepared until the title was deduced; fourthly, that the averment that the defendants discharged B. and the plaintiffs from deducing title, though not alleged to have been under seal, was sufficient on general demurrer; and, lastly, that it was not necessary to point out the respective interests of B. and others in the money to be paid, as the covenant was not a covenant to pay the principal sum to B. and the others according to their respective interests, and the interest to B., but was a covenant to pay to B. both principal and interest. *The Thames Haven Dock and Railway Company v. Brymer*, 696

(3). *In Action for Extortion.*

Seemle, that in debt on the 29th Eliz. c. 4, against the sheriff for extortion, on executing several writs of

fi. fa., it is not sufficient to allege that the defendant took for the said executions a certain sum, being a larger recompense than is by the statute limited, that is to say £— more; but the declaration should state what he ought to have taken, and what was the excess, on each writ. *Berton v. Lawrence*, 816

(4). *In Action on Promissory Note.*

In an action by the manager of a Joint-stock Banking Company upon a note indorsed by the defendant to the Company, the declaration stated, that one L. made his promissory note at L. in Scotland, payable to the order of the defendants, and delivered the said note to them, and that they indorsed it to the Company; that the note was not paid, although duly presented for payment; and that it was protested for non-payment, *whereof* the defendant had notice.—Pleas, first, that the defendants had no notice of the said note being so protested, modo et formâ; and secondly, that the Company, between the 25th of May and the 25th of July, 1847, did not deliver at the Stamp-Office a return in pursuance of the 7 Geo. 4, c. 67.—*Verification*.

Held, that the word "*whereof*," after verdict, was not confined to the allegation of protest, and that the declaration was good in arrest of judgment.—*Held*, also, that both the pleas were bad non obstante veredicto: the first, on the ground that no protest of an inland note, which it was to be taken to be, was necessary; and the second plea, on the ground that the due making of the return mentioned in that plea was not a condition precedent to the Company's right to recover upon the note. *Bonar v. Mitchell*, 415

(5). *In Action for Railway Calls.*

1. A declaration for calls stated,

that the defendant, at the time of the making of the calls thereafter mentioned, *was and still is* the holder of divers shares, to wit, &c., in the Company, called &c., and before the commencement of the suit *was and still is* indebted to the Company in a large sum, to wit, &c., in respect of two calls upon the said shares *therefore duly made by the said Company*, each of the said calls being &c.; whereby and by reason of the said sum of &c. being wholly unpaid to the said Company, an action hath accrued to the said Company by virtue of the special Acts of Parliament, viz. the Company's Acts, (incorporating the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16):—*Held*, on special demurrer, that the declaration was good, and that it sufficiently complied with the form given by the 8 & 9 Vict. c. 16, s. 26. *The East Lancashire Railway Company v. Croxton*, 287

2. The form of declaration given by the 26th section of the 8 & 9 Vict. c. 16, is not applicable in an action for calls against an executor, where the calls were made in the lifetime of the testator. *The Birkenhead, Lancashire, and Cheshire Junction Railway Company v. Cotesworth*, 226

(6). *In Action for Malicious Arrest.*

A declaration for a malicious arrest by *capias* under the 1 & 2 Vict. c. 110, stated that the defendant not having any reasonable or probable cause of action against the plaintiff, to the amount for which he maliciously caused the plaintiff to be arrested, falsely, maliciously, and unjustly procured from a Judge an order for a *capias*, by falsely and maliciously representing to the Judge that the plaintiff was justly and truly indebted to the defendant in a certain sum, by means of a certain false affidavit then shewn and uttered by the defendant

before the Judge; and thereupon maliciously caused a *capias* to be issued, and without any reasonable or probable cause of action caused the plaintiff to be arrested:—*Held*, on special demurrer, that the declaration was sufficient, and that it need not more particularly set out the false statement by which the Judge was induced to make the order, nor shew that the facts were false within the defendant's knowledge, or that he had not reasonable or probable cause for believing them true. *Ross v. Norman*, 319

(7). *In Action by Reversioner.*

A declaration in case stated, that certain messuages and closes were in the occupation of the tenants of the plaintiffs, the reversion thereof belonging to them, and that the defendant so wrongfully, carelessly, negligently, and improperly, and without leaving any proper or sufficient support, worked certain mines, and dug and got the minerals out of the mines near to the said messuages and closes, that thereby the foundations of the messuages were injured, and, in consequence thereof, large portions of the buildings fell down, and the ground on which the buildings stood swagged and gave way:—*Held*, first, on motion in arrest of judgment, that the declaration was good, although it contained no averment that the plaintiffs had a right to have the messuages supported by the soil under which the defendant got the mines; for, as it was neither alleged nor could be inferred, that the soil in which the mines were was the defendant's, or that the defendant had all the right to get the mines which the owner of the adjoining soil had, the defendant was *prima facie* a wrong doer; and therefore, as against him, the declaration disclosed a sufficient title.

Secondly, that, as the defendant did

work the mines without leaving sufficient support to the plaintiffs' buildings and land, they were entitled to a verdict on the plea of not guilty; for, if any circumstance justified the defendant in getting the minerals without leaving sufficient support, that should have been pleaded by way of confession and avoidance. *Jeffries v. Williams*, 792

II. PLEA.

(1). *In Abatement*.

To an action of debt for calls by a Railway Company, the defendant pleaded in abatement his privilege, as an attorney of the Court of Common Pleas, to be sued in that Court: to this the plaintiffs replied, that the defendant was an attorney of this Court; and the plea, after the prayer of judgment by inspection of the record, concluded by an entry of continuance by cur. adv. vult., and a day for judgment was given to the plaintiffs:—*Held*, that the plaintiffs were entitled to judgment, although there was no rejoinder, as it appeared that the defendant was an attorney of this Court. *The South Staffordshire Railway Company v. Smith*, 472

(2). *In Bar*.

To an action on an indenture, whereby the defendant covenanted to pay R., the plaintiff's testator, 700*l.*, the defendant, after setting out on oyer the will and probate granted by the Archbishop of Canterbury, pleaded that R. died in the parish of L., and, at the time of his death, was resident and had the indenture in that parish; that the parish of L. is a royal peculiar and out of the jurisdiction of the said Archbishop, by reason whereof the proving of the will and granting probate of the goods of R., in respect of the said debt and cause

of action, of right belonged to the Queen and not to the Archbishop; that the will was never proved before, nor were letters testamentary of R. ever granted by, the Queen; and the letters testamentary so produced in Court, and granted by the said Archbishop, are of no effect against the defendant in respect of the said debt and cause of action; and save as aforesaid, by the granting of those letters testamentary, the plaintiff never was executor of R. On special demurrer—*Held*, first, that the plea was properly pleaded in bar of the action generally; secondly, that it did not amount to an argumentative plea of ne unques executor. *Easton v. Carter*, 8

(3). *General Issue*.

A declaration in an action under the 9 & 10 Vict. c. 93, stated that H. was in the employ and service of the defendants, and that, in the discharge of his duty as such servant, he became a passenger in a railway carriage of the defendants, drawn by a steam-engine under the guidance of the defendants, to wit, by their servants; that the defendants were possessed of another steam-engine, which then was drawing other railway carriages, and which was under the guidance of the defendants, to wit, by their servants; yet the defendants conducted themselves so negligently in and about the guidance of the first-mentioned engine and carriage, and also in and about the guidance of the other engine and carriages, that a collision took place, and H. was thereby killed. Plea, that the collision took place solely through the negligence of the servants of the defendants; and that the engines and carriages, at the time when &c., were respectively under the guidance of the servants of the defendants, who were fit and competent persons to have the guidance

of the same; and that the negligence was wholly unauthorised by the defendants, and without their leave, licence, or knowledge:—*Held*, on special demurrer, that the plea did not amount to the general issue. *Hutchinson v. The York, Newcastle, and Berwick Railway Company*, 343

(4). *In Action on Bill of Exchange.*

1. To an action on a bill of exchange by the indorsee against the executrix of the drawer, the defendant pleaded, that after the bill became due, and in the lifetime of the drawer, it was agreed between the plaintiff, then the holder of the bill, and the acceptor, without the authority or consent of the drawer, "that, for a good and sufficient consideration in that behalf, that is to say, that in consideration that the said J. O. (the acceptor) would, during a certain reasonable time, to wit, during the space of one month from the day and year last aforesaid, use his best endeavours to procure a new and approved negotiable bill of exchange to be taken by the plaintiff if satisfactory to him, in lieu and substitution and for and on account of the said bill, he the plaintiff would, for and during the period aforesaid, abstain from and forbear enforcing payment from J. O. of the said bill by proceedings at law or otherwise." The plea then averred, that in pursuance of the said agreement, the said J. O. did during the said period use his best endeavours, &c., and concluded by alleging, that the plaintiff gave time to the acceptor without the consent of the drawer; and that the drawer had never ratified the agreement.—*Verification*. *Replication, de injuriâ*:—*Held*, on general demurrer, that the plea disclosed a sufficient consideration for the holder's promise to suspend the action against the acceptor, and that the surety was thereby discharged:—*Held*, also, on special de-

murrer, that the replication *de injuriâ* to this plea was bad. *Moss v. Hall*, 44

2. To an action by the indorsee against the acceptor of a bill of exchange, the defendant pleaded that the drawer indorsed the bill to the plaintiff without value or consideration, and that the plaintiff always held the same without value or consideration; and that after the bill became due, the drawer accepted certain scrip certificates from the defendant, in full satisfaction and discharge of the bill. *Replication*, that the bill was indorsed for a good and sufficient consideration. *Issue* thereon:—*Held*, after verdict, that the plea was bad, and that the plaintiff was entitled to judgment non obstante veredicto. *Milnes v. Dawson*, 942

(5). *In Action by Sheriff against Bailiff.*

A declaration stated, that, by indenture made between the plaintiffs, a sheriff, and the defendants, after reciting that the plaintiffs had appointed the defendant T. their bailiff, the defendants covenanted that T. "should not suffer any escape, nor permit any prisoner in his custody as bailiff to go at large," without the consent of the sheriff; and that, if any action was commenced against the plaintiffs "touching or concerning any matters wherein T. should act, or assume to act, as bailiff," T. would pay the sheriff his damages thereby incurred, and the defendants would save harmless the plaintiffs against all actions, &c., "for or by reason of any extortion or escape happening by the act or default of T." The declaration then alleged, that the plaintiffs as sheriff took one H. on a ca. sa.; and that H. escaped out of custody "by the default of the defendant T., and not otherwise, the defendant T. then being bailiff of the plaintiffs as such sheriff." The defendants, after setting out

the deed on oyer, pleaded, "that the default by which H. escaped was not a default of T. as such bailiff of the plaintiffs."—*Held*, on special demurrer, that the plea was bad for ambiguity, as it might mean either that the default was not the act of T. as bailiff, or whilst assuming to act as bailiff, or in relation to his character of bailiff.

Semble, that the declaration would have been bad on special demurrer, for not stating in what way the default occurred. *Cubitt v. Thompson*, 811

(6). *Issuable Plea.*

To an action of covenant for non-payment of an annuity, brought by the administratrix of A. upon a covenant, which stated that A. would stand possessed of the said sum, in trust to pay the same to E. S. (the defendant's wife), upon receipt thereof, to the use of the defendant's wife. The defendant (being under terms of pleading issuably,) pleaded, that the intestate never executed the deed, nor did he ever become a trustee under it. The plaintiff having signed judgment thereon:—*Held*, that the judgment was wrongly signed. *Limwood v. Squire*, 234

(7). *Immaterial Issue.*

A declaration in assumpsit on a special contract, by which the defendant agreed to take a certain portion of a ship's cargo on her arrival at B., after an averment of readiness and willingness on the part of the plaintiff to deliver the cargo at and after the ship's arrival at B., alleged as a breach, that the defendant, before the arrival of the ship at B., discharged the plaintiff from delivering the cargo, and thenceforth continually afterwards refused to perform the agreement. The defendant, after pleading several pleas to the whole declaration,

pleaded, thirdly, as to so much of the breach as related to the discharging the plaintiff from delivering the cargo, and to the refusing to perform the agreement, by a traverse of those allegations. Fourthly, as to so much of the breach as related to the defendant's having, before the arrival of the ship, discharged the plaintiff from delivering the cargo, and refused to perform the agreement, that, before the arrival of the ship, the defendant retracted his discharge and refusal. Fifthly, as to the "residue of the said breach," by traversing the allegation of the plaintiff's readiness and willingness to deliver the cargo. At the trial, a verdict was found for the plaintiff upon all the issues but the fifth, and that issue was found for the defendant. In the judgment roll the damages were assessed "on occasion of the breach of promise in the declaration assigned (other than the part of the said breach in the plea mentioned)," at a certain sum; and the roll concluded by stating that the plaintiff is in mercy as to the premises, as to the issue found for the defendant on the fifth plea:—*Held*, on error, affirming the judgment of the Court below, that, if the words "the residue of the said breach" were to be construed as meaning such part of the breach as was uncovered by the third and fourth pleas, the residue was nothing, and the plea was immaterial, as the third plea covered the whole of the breach; but if, on the other hand, the words in question were to be taken as relating to so much of the breach as was uncovered by the fourth plea, and if that plea covered only that part of the breach which related to what took place before the arrival of the ship at B., as the third and fourth issues had been found for the plaintiff, the issue raised by the fifth plea was altogether immaterial, and the plaintiff was sub-

stantially entitled to judgment non obstante veredicto, and therefore that the defendant had no cause to complain; so that, in either view, the fifth plea was wholly immaterial. *McClure v. Ripley*, 140

III. REPLICATION.

(1). *Admissions by.*

1. To an action on a bond, the defendant pleaded, that one J. F. made the bond, and the defendant also made it, as his surety; and that, after it was so made, the said J. F. being unable to meet his debts, entered into a deed with his creditors, of whom the plaintiff was one, by which deed he assigned all his property upon trust, for the benefit of the plaintiff and his other creditors, to certain trustees; and that the plaintiff did by the said deed covenant with the said J. F., that the plaintiff would not at any time thereafter commence or prosecute any action or other proceeding against the said J. F., for or by reason of any debt then due and owing by him to the plaintiff; and thereby the plaintiff gave time to the said J. F. in respect of the said debt and writing obligatory, in respect whereof the defendant was such surety. The plaintiff replied by setting out the deed in hæc verba. The deed contained (inter alia) a proviso that nothing therein contained should prejudice or affect any claim, demand, or remedy which the several parties thereto, and creditors of the said J. F., then had or should have by virtue of any mortgage, lien, charge, or other incumbrance against any person who might be liable for the payment of any of the debts of the said J. F., in the character of a surety or otherwise; and it witnessed, that, in consideration of the assignment thereinbefore made, the several parties thereto, and creditors of the said J. F., covenanted with the said J. F., that they would not at any time commence or prose-

cute any action, suit, or other proceeding against the said J. F., for any debt then due from him to them; and that, in case of any such action or suit being commenced or prosecuted by them, contrary to the terms of the deed, the deed might be pleaded as a general release in bar of any such action or suit.—Verification:—*Held*, on special demurrer to the replication, that it was good, inasmuch as it admitted the effect of the deed as alleged in the plea, but avoided it by the terms of the proviso. *Stevens v. Stevens*, 306

2. To an action upon certain bills of exchange, drawn by M. & Sons upon and accepted by the defendant, and payable to the plaintiff at certain periods after date, the defendant pleaded that, after the bills became due, M. & Sons made an agreement with the acceptor to discharge him on receiving 2s. 9d. in the pound upon (inter alia) the said acceptance, in consideration of the payment of a certain specified sum in settlement of their differences of account, and that the plaintiff took the bills after the agreement. The plea contained averments that M. & Sons were the holders of the bills at the time the agreement was made, and that they afterwards delivered them to the plaintiff. The replication traversed the former of these allegations:—*Held*, that, although the replication admitted a *delivery* of the bill by M. & Sons to the plaintiff after the making of the agreement, that it did not admit such a delivery as to give the plaintiff a new title to the bill, and, consequently, that the replication was good as putting in issue a substantial averment in the plea. *Corlett v. Booker*, 197

(2). *To Plea of Common of Pasture.*

To trespass quare clausum fregit, the defendant pleaded that the locus in quo was in the borough of H., which was an ancient borough, and that the

burgesses thereof were a body corporate by the name of the Burgesses of the Town of H.; that the Earl of A., being seised in fee of certain land, whereof the locus in quo was part, by charter granted to the burgesses of the town of H., their English heirs and successors, and their tenants, common of pasture in the said land for all their cattle within the town of H., levant and couchant. The plea then stated, that the defendant was a burgess of H., and an English successor of the burgesses of H., to whom the grant was made, and, as such burgess and English successor, ought to have common of pasture for his cattle levant and couchant within the borough of H.; wherefore he placed his cattle there, which was the trespass complained of. Replication, that the defendant ought not to have common of pasture for his cattle levant and couchant within the borough of H., modo et formâ:—*Held*, that the replication only put in issue the fact of the defendant having such right of common as was stated in the plea; and therefore the plaintiff could not give evidence that the right of common was extinguished by proceedings under the Inclosure Act, 8 & 9 Vict. c. 118; but he ought to have shewn in what way the grant ceased to operate, by replying the facts specially.

Held, also, that the plea was bad, inasmuch as it alleged a grant to the Corporation of H. in their corporate capacity, and not for the benefit of the individual burgesses. *Parry v. Thomas*, 37

(3). To Plea of Set-off.

1. To a plea of set-off in debt on simple contract, the plaintiff replied, as to 49*l.* 16*s.* 10*d.*, parcel of the debt, that the causes of set-off, so far as the same related to 49*l.* 16*s.* 10*d.*, did not accrue within six years, concluding with a verification. And as to the

residue of the causes of action, the plaintiff says, that he was not nor is indebted modo et formâ; concluding to the country:—*Held*, on special demurrer, that the replication was bad.

The plaintiff should in such case reply, that part of the subject-matter of the set-off is barred by the statute, and that he is not indebted to the defendant in any sum which (excluding the part so barred) equals the amount of the plaintiff's demand. *Mead v. Bashford*, 336

2. To an action against the public officer of a banking copartnership for money lent, &c., the defendant pleaded, by way of set-off, that the plaintiff was the holder of certain shares in the co-partnership under their deed; and after setting out the deed under which the copartnership was formed, averred that a certain sum was owing for calls made in pursuance of the terms of the deed (setting out and averring performance of certain matters required by the deed for the purpose of making such calls good). To this the plaintiff replied nil debet:—*Held*, on special demurrer, that the replication was bad, inasmuch as the debt arising from the calls was founded solely on the deed:—*Held*, also, that a similar replication to a like plea of set-off, which stated the plaintiff to be holder of certain shares obtained by purchase, was bad.—*Held*, also, that the pleas were good. *Milvain v. Mather*, 55

POLICE CONSTABLE.

See LONDON POLICE ACT.

POLICY OF ASSURANCE.

See STAMP, 1.

POWER.

Publication of Will.

By deed, certain estates were settled to the use of such person or per-

sons, in such parts, shares, and proportions, manner, and form, and for such ends, intents, and purposes, and under and subject to such powers, provisoes, and limitations as S. S. should, by deed, as therein mentioned, or by her last will and testament, or any writing purporting to be or in the nature of a last will and testament, to be by her signed and *published* in the presence of and attested by two or more credible witnesses, and which she was thereby authorised to make and execute, direct or appoint.

S. S., by her will, dated in 1826, (in which year the testatrix died), devised the estate to certain persons, and appointed executors, and signed and sealed her said will. The attestation clause was as follows:—"Signed and sealed in the presence of H. O., of &c., and M. E., of &c."

Held, that, as *sealing* the will in the presence of two witnesses amounted to a publication of it, the attestation sufficiently expressed that the will was published, and that the publication was attested as required by the power, and, therefore, that the power was well executed. *Vincent v. The Bishop of Sodor and Man*, 683

PRACTICE

See AMENDMENT.

ATTORNEY, (1), 1, 2.

JOINT STOCK COMPANY.

JUDGE'S ORDER.

NEW TRIAL.

OUTLAWRY.

TRIAL AT BAR.

WRIT OF SUMMONS.

(1). *Changing Venue*.

One of several defendants may, in general, change the venue on the common affidavit, without the consent of the others; and if the latter are prejudiced by that step, they should apply, on special grounds, to bring it back. *Job v. Butterfield*, 827

(2). *Security for Costs*.

A Judge's order directing the real plaintiff, in an action brought by a nominal plaintiff, who is insolvent, to make himself responsible for the defendant's costs therein, is wrong, and ought to be amended, as the defendant is in such case entitled to security for his costs to the satisfaction of the Master. *Mais v. M'Namara*, 267

(3). *Deposit in Lieu of Bail*.

Where a party arrested by *capias* under the 1 & 2 Vict. c. 110, deposits money with the sheriff, under the 4th section, which is paid into Court, and neglects to take any further steps, the plaintiff is entitled to take the amount (subject to taxation) out of Court, without awaiting the final determination of the suit. *Nyssen v. Ruyenaers*, 857

(4). *Variance between Plea and Abstract*.

To an action for calls, in which the declaration contained allegations that a board of directors met to make a call, that another board met to determine how notice of a call should be given, and a third meeting met to determine when the call should be paid, the defendant having obtained leave to plead (*inter alia*) "that the persons alleged as having made the call did not constitute a board of directors," pleaded, "that the said persons in the said declaration mentioned as constituting a board of directors of the said Company did not constitute such board, *modo et formâ*;" the plaintiff signed judgment thereon, which judgment was set aside by a Judge's order:—*Held*, that judgment was rightly signed, and the Court set the order aside, but without the costs of such application, allowing the defendant to plead *de novo* on terms. *Wills v. Robinson*, 302

PRIVY COUNCIL.

(5). *Costs of the Day.*

A plaintiff having entered his cause on the commission day for trial at the Assizes, on the following day caused it to be called on out of its turn, in order that a witness might be called on his subpoena. That was accordingly done, and the witness not appearing, the plaintiff withdrew the record, having been told by the Judge's clerk that he might re-enter it before twelve o'clock. The defendant then delivered a *ne recipiatur*, on the ground that a record could not be entered after the sitting of the Court, and the Judge so ruled. The witness afterwards came into Court, and the plaintiff then offered to try, or that the cause should stand at the bottom of the list; but the defendant refused:—*Held*, that the defendant was not entitled to the costs of the day, since it was through his own default that the cause was not tried. *Pope v. Fleming*, 249

(6). *Staying Proceedings.*

In an action of debt brought in the superior Court, to recover the sum of 9*l.* 10*s.*, the defendant pleaded, except as to 8*l.* 14*s.*, never indebted, and as to that sum tender before action, and payment of that amount into Court. A verdict having been found for the plaintiff for 16*s.*, the Court refused to stay the proceedings upon payment of the debt, without costs, on the ground that the action was frivolous, as brought to recover a sum less than 40*s.* *Nurdin v. Fairbanks*, 738

PRINCIPAL AND AGENT.

See EVIDENCE, (1).
PAYMENT.

PRIVY COUNCIL.

Under the 25 Hen. 8, c. 19, an appeal lay from the Archbishop's Court

PROMISSORY NOTE. 1021

to the Delegates in all spiritual causes, whether touching the King or not; and, therefore, by the 2 & 3 Will. 4, c. 92, there is now an appeal, in such cases, to the Judicial Committee of the Privy Council, whose decision is final.

Semble, that the 9th section of 24 Hen. 8, c. 12, which, in matters touching the King, gives an appeal from certain Ecclesiastical Courts to the Upper House of Convocation, is repealed by the 25 Hen. 8, c. 19.

Quære—Whether a proceeding by duplex querela is a "matter touching the King" within the 24 Hen. 8, c. 12, s. 9. *In re Gorham v. The Bishop of Exeter*, 630

PROFERT.

See PLEADING, I. (2).

PROHIBITION.

See COUNTY COURT, (1).
PRIVY COUNCIL.

PROMISSORY NOTE.

See PLEADING, I. (4).
WINDING-UP ACT, 1.

A parish vestry having resolved to borrow money for the purpose of building almshouses, the money was in 1830 advanced by the plaintiff upon the security of a promissory note payable to him, or bearer, on demand, with interest, and signed by the defendants thus:—"J. H., churchwarden, J. E., overseer, or others for the time being." The interest had been regularly paid by the overseers for the time being up to 1847, but the defendants had never paid the interest, or in express terms authorised the parish officers to pay it for them. The defendants having pleaded the Statute of Limitations to an action on the note—*Held*, that it was a question for the jury, whether, by the form of the note, the defend-

ants had not constituted the parish officers for the time being their agents for the payment of interest, so as to take the case out of the statute. *Jones v. Hughes*, 104

PROVISO.

See CONDITION PRECEDENT.
PLEADING, III. (1).

PUBLICATION.

See POWER.

PUBLIC OFFICER.

See BANKING COPARTNERSHIP.

QUEEN ANNE'S BOUNTY.

See EVIDENCE, (3).

QUEEN'S PRISON, (KEEPER OF).

See INSOLVENT DEBTOR.

RAILWAY COMPANY.

See ARBITRATION, 2.

BANKRUPT.

CONTRACT.

EVIDENCE, (4), (6).

INFANT.

JOINT STOCK COMPANY.

LANDS CLAUSES CONSOLIDATION ACT.

MASTER AND SERVANT, (2), 1, 2 ; (3).

PLEADING, I. (2), (5).

STATUTE.

TOLL, (2).

(1). *Contract by.*

1. A Railway Company, duly incorporated by Act of Parliament, entered into an agreement, *not under their seal*, with a contractor, that he should execute certain works upon their Railway, for the purpose of changing the system of locomotion which they then employed, the rope and stationary en-

gine system, to the ordinary locomotive principle. The contractor, in pursuance of the agreement, entered upon the works, and performed a portion of them; but before they were completed he was dismissed by the Company:—*Held*, that he could not recover the value of this work. *Diggle v. The London and Blackwall Railway Company*, 442

2. A. and B. having entered into a joint agreement with a Railway Company to execute a contract, called "The Morley contract," for the construction of a tunnel upon the line, A. assigned all his right and interest in the contract to B., and the latter agreed to pay A. a given sum "on the completion of the said contract." After this agreement had been entered into between A. and B., it became necessary to alter the levels of the line, and B. by agreement with the Company abandoned the contract, and another was entered into between the Company and other persons, under which the tunnel, at the altered level, was completed:—*Held*, that A. was not in a position, upon the completion of the substituted contract, to maintain an action against B. for the payment of the sum stipulated to be paid by his agreement with A. *Humphreys v. Jones*, 952

(2). *Action for Calls.*

A call made payable by instalments, under the 8 & 9 Vict. c. 16, is good; but an action of *debt* will not lie for the recovery of an instalment, before the time for the payment of all the instalments has arrived. *The Ambergate, Nottingham, and Boston, and Eastern Junction Railway Company v. Coulthard*, 459

(3). *Action to recover back Deposit.*

In July, 1845, a Railway Company was provisionally registered, and a

prospectus issued, headed—"Capital, 2,500,000*l.*, in 100,000 shares of 25*l.* each." On the 6th of October, 1845, the plaintiff applied for 200 shares by letter, in which he said, "I agree to accept the same or any portion thereof, subject to the provisions of the subscribers' agreement; and I further agree to execute the same and any other agreement or deeds, and to pay the deposit when required." On the 11th of October a letter of allotment of 100 shares was sent to the plaintiff, containing notice to pay the deposit on or before the 20th of October, and adding—"I beg also to inform you, that scrip for the shares will be delivered to you in exchange for this letter and receipt, upon your executing the parliamentary contract and subscribers' agreement, which lies here for signature until further notice, and afterwards at such other places as will be hereafter notified." The plaintiff, who resided at Exeter, paid the deposit on the 20th of October, and on the 3rd of December the subscribers' agreement was sent to Exeter, and the plaintiff had an opportunity of executing it, but did not. It did not appear, however, that he was called upon to execute it, nor that any notice was given to him that the deed was at Exeter. The subscribers' agreement, which bore date the 15th of October, authorised the directors to take such measures and incur such preliminary expenses as they might think advisable, to increase or diminish the capital of the Company, to extend the railway, or, if they should think fit, to abandon the undertaking. It also specially authorised them to apply the deposits in payment of the expenses, and the deposits were so applied; but the undertaking was abandoned in consequence of the allottees not furnishing sufficient funds to carry it on, and without any fraud or misconduct on the part of the ma-

naging committee. On the winding up of the concern, a committee of inquiry had been appointed, and the defendant, one of the managing committee, handed to them the minute-book, containing an entry made by the secretary of the Company in the course of his duty, of a certain resolution proposed by the defendant at a meeting of the committee of management. In an action by the plaintiff to recover back his deposit as upon a failure of consideration, the learned Judge ruled that this resolution was evidence against the defendant; and he told the jury that, if they thought that the project had been abandoned as abortive at the time the action was commenced, they should find for the plaintiff. On a bill of exceptions to this ruling—*Held*, first, that the learned Judge was right in admitting the resolution in evidence.

Secondly, that the direction of the learned Judge was correct, since the plaintiff's claim was founded on the failure of the project, and his want of consent or acquiescence in the application of the money, and there was no evidence of consent or acquiescence besides the letters and the subscribers' agreement; and, the latter document not being in existence at the time of the plaintiff's application for shares, he was, by his letter of the 6th of October, subjected only to the terms of such an agreement as the directors might properly call on him to execute; and that the agreement in question was not of that description, inasmuch as it purported to give the directors larger powers than the 7 & 8 Vict. c. 110, s. 23, authorised them to assume; and also purported to enable them to expend the deposits in the exercise of such excessive powers. *Ashpitel v. Sercombe*, 147

RATE.

See BOROUGH RATE.

RECEIPT.

See STAMP, 2.

RELEASE.

See ATTORNEY, (2).

COVENANT, (2).

In an action for dividends sold and assigned, and on an account stated, it appeared, that the plaintiff, being entitled to the dividends on certain Bank stock, agreed to sell them to the defendant for 175*l*. After the bargain was made, it was found that the stock was standing in the name of the Accountant-General, and that it required an order of the Court to enable the defendant to receive the dividends. It was then agreed that the deed of transfer should be executed, and the question as to the costs of obtaining the order should be referred to two solicitors. The deed was accordingly executed, and the sum of 125*l*. paid by the defendant to the plaintiff at the time of its execution. The deed stated, that the whole purchase-money was paid, and released it; but, in pursuance of a previous arrangement, the defendant retained 50*l*. to abide the event of the reference. The plaintiff's evidence consisted of a paper signed by the defendant, in which credit was given for 125*l*., and 50*l*. stated as remaining due. The defendant gave in evidence the deed of transfer, and also an agreement signed by the parties at the time of signing the above paper, to refer the question as to the above-mentioned costs, and an arrangement whereby the 50*l*. was to abide the decision of that question:—*Held*, first, that the plaintiff could not recover the remainder of the purchase-money under the first count, inasmuch as there was no debt until the deed was executed, and upon its execution the debt was released. Secondly, that

there was no evidence of an account stated. *Baker v. Heard*, 959

REPLEVIN.

See BOROUGH RATE.

EVIDENCE, (1).

STATUTE OF LIMITATIONS, (2).

REVENUE.

The owner of a vessel, who knowingly lets it for the purpose of fetching goods to be landed without payment of duty, is, if the goods are so landed, liable to penalties under the 8 & 9 Vict. c. 87, s. 46, as a person "concerned" in the illegal unshipping of goods. *The Attorney-General v. Robson*, 790

REVERSIONER.

See PLEADING, I. (7).

RIGHT TO BEGIN.

See NEW TRIAL.

ROYAL PECULIAR.

See PLEADING, II. (2).

SCIRE FACIAS.

See JOINT STOCK COMPANY.

SECURITY FOR COSTS.

See JUDGE'S ORDER.

SET-OFF.

See COUNTY COURT, (1), 2.

PLEADING, III. (3).

SHERIFF.

See PLEADING, I. (3); II. (5).

SHIP.

See WARRANTY.

SMALL DEBTS ACT.

See COSTS, (2).

(1). "*Carrying on Business.*"

1. A clerk in the Admiralty, who, as such, attends daily at an office within the city of London, is not a person who "*carries on his business*" there within the London Small Debts Act, 10 & 11 Vict. c. lxxi. *Buckley v. Hann*, 43

2. A clerk to the Privy Council is not a person who "*carries on his business*" at the office of the Privy Council, within the meaning of the 60th section of the County Courts Act, 9 & 10 Vict. c. 95. *Sangster v. Kay*, 386

(2). "*Cause of Action.*"

A bill of exchange was drawn and accepted, and the indorser put his name upon it, within the city of London, but it was delivered to the indorsee in the county of Middlesex:—*Held*, that the cause of action did not arise within the city of London. *Buckley v. Hann*, 43

SMUGGLING.

See REVENUE.

SOLICITOR.

See ATTORNEY.

STATUTE OF LIMITATIONS, (1).

TOLL, (1).

SPECIFICATION.

See PATENT.

STAMP.

See EVIDENCE, (5).

1. An assignment of a policy of assurance as security for a debt, with a proviso for redemption on payment, is a mortgage within the 55 Geo. 3, c. 184, Sched. Part 1, and therefore

requires an ad valorem stamp. *Caldwell v. Dawson*, 1

2. The following document, stamped as an agreement was held admissible in evidence without a receipt stamp:—"I have received your cheque for 391*l.* 10*s.* 3*d.*, being the payment for an overdue bill and interest, in the hands of D.; and I hereby undertake to procure and hand the said bill over to you." *Von Dadsleben v. Swann*, 825

STATUTE.

See TOLL.

Construction of.

By an Act of 12 Geo. 3, a Company was incorporated by the name of the Company of Proprietors of the Chester Canal Navigation Company, for making a canal from Chester to Middlewich; by another Act of the 33 Geo. 3, another Company was incorporated by the name of the Company of Proprietors of the Ellesmere Canal, to make a canal from Shrewsbury to the river Mersey, at Netherpool in Cheshire. By another Act of the 44 Geo. 3, (1804), the Ellesmere Canal Company was empowered to take from the river Dee, at Llandisilio in Denbighshire, a supply of water for their canal, and were also empowered to take water from Bala Lake, for supplying the river Dee with as much water as they should take from it for their canal, or more—and for that purpose to make cuts from the Lake to communicate with the river Dee, at —, with such embankments, trenches, and other works as might be necessary for the purpose. In 1807, the Ellesmere Canal Company, by deed, covenanted with Sir W. W. Wynn, Bart., who was then seised in fee of Bala Lake, that they would not at any time thereafter draw off from the said Lake water for the purpose

of their said canal, to a lower level than the mark on a certain standard to be erected near the Bala Lake, indicating the mean summer level of the waters of the said Lake, nor would at any time embank or impound up the said water more than one foot above such level. In 1813, the Chester Canal Company and the Ellesmere Canal Company were, by statute, united into one Company by the name of the United Company of Proprietors of the Ellesmere and Chester Canals. By the 7 & 8 Geo. 4, c. cii., all the four previous Acts were repealed, and the proprietors of the two Companies were re-united into a new Company, intituled The United Company of Proprietors of the Ellesmere and Chester Canals, for (inter alia) maintaining the former canals then already completed, and making certain new cuts; and it was thereby enacted, that all contracts, covenants, and agreements entered into by virtue of the powers contained in the several repealed Acts should remain in full force, as if the same had been made under the powers contained in that Act: and the Company were authorised to construct such or so many weirs, embankments, and other works, at or near to Bala Lake, and to do and execute all such things as should be necessary for pounding up, &c., and drawing off the water in and from the said pool, so as to be thereby enabled at all times to replace in or restore to the river Dee an equal or greater quantity of water than should or might be taken therefrom by the said United Company, by means of the works at Llandisilio, for the purpose of supplying the canal therewith. By 9 & 10 Vict. c. cccxxii. it was enacted, that the Company should thenceforth be called by the name of the Shropshire Union Railways and Canal Company, and that all persons should have the same

rights and remedies against The Shropshire Union Railways and Canal Company, which, before the passing of that Act, they had against The United Company of Proprietors of the Ellesmere and Chester Canal:—*Held*, in an action by the devisee of Sir W. W. Wynn against the last-mentioned Company for the breach of the above covenant, by impounding the water of Bala Lake to a height of more than one foot above the mark on the standard, whereby its waters overflowed and damaged the plaintiff's land, that the covenant was repealed by the 7 & 8 Geo. 4, c. cii. as to all acts *bonâ fide* done by the Company, under its provisions, for the purpose of restoring to the river Dee a quantity of water equal to what they should abstract for the use of the canal by means of the works at Llandisilio. *Sir W. W. Wynn, Bart. v. The Shropshire Union Railways and Canal Company*, 420

STATUTE OF FRAUDS, 29 CAR. 2, c. 3.

Memorandum of Contract within Section 17.

The defendant verbally agreed to purchase of the plaintiff certain barrels of flour. The defendant afterwards wrote to the plaintiff, stating, that he had received some barrels, which were not so fine as the sample, and were not the barrels he had bought, and that he would not have them. In answer the plaintiff wrote as follows:—"Annexed you have invoice of the flour sold you last Friday. I am very much astonished at your finding fault with the flour. It was sold to you subject to your examining the bulk; and it was not until after you had examined it, and satisfied yourself both of quality and condition, that you confirmed the pur-

chase. What was forwarded you was the same you saw. Under these circumstances you cannot, therefore, object to fulfil your agreement." The defendant replied as follows:—"I beg to say the barrels I have received is not the same I saw. I took a sample with me from the sample I have, and the barrels I saw was quite as fine as I compared them with, nor was they lumpy. Now the barrels I have received is all very lumpy, and none of them so fine as the same. If you will take them back and pay charges, I will with pleasure send them. There must be some mistake about them:"—*Held*, that the letters did not constitute a sufficient note or memorandum in writing of the contract within the 17th section of the Statute of Frauds. *Archer v. Baynes*, 625

Memorandum within Section 4.

Debt on an Irish judgment. Plea, that the judgment was recovered against the defendant as surety for S. & Co., to secure payment of monies advanced to them by the plaintiff; and that S. & Co. paid all monies due from them to the plaintiff, for which the judgment was to be such security. Replication, that, after the recovery of the judgment, an indenture was made between S. & Co. and the plaintiffs, whereby, after reciting the judgment, and various unsettled accounts between S. & Co. and the plaintiff, it was witnessed, that, for the sake of winding-up the said transactions, S. & Co. and the plaintiff agreed (inter alia) that the plaintiff should advance to a certain banking Company 800*l.* guaranteed by him on behalf of S. & Co., and should also advance to S. & Co. 200*l.*, and that 1000*l.* should be the debt thenceforth due from S. & Co., which should be payable with interest, and that the agreement should be without prejudice to the judgment

against the defendant. Averment, that, after the making of the indenture, and before the execution thereof by the plaintiff, in consideration that the plaintiff would execute it, and would advance the said sums of 800*l.* and 200*l.*, the defendant promised the plaintiff that the judgment should remain as a security for the repayment of the 1000*l.* and interest; that the plaintiff executed the deed and advanced the sums of 800*l.* and 200*l.*; but that S. & Co. had not repaid the same. Rejoinder, that the defendant did not promise modo et formâ, and issue thereon. At the trial, the plaintiff gave in evidence the following memorandum, which was signed by the defendant and another surety before the plaintiff executed the deed:—"We hereby consent to the within deed being executed by and between the parties thereto, and that the same shall be without prejudice to the plaintiff's rights and remedies under his judgment against us, and that the said judgment shall remain in full force and effect." This memorandum had been annexed to the deed, but was detached and sent to the defendant, who signed it without seeing the deed:—*Held*, that, assuming this was a transaction within the 4th section of the Statute of Frauds, which *semble* it was not, there was a sufficient memorandum in writing to satisfy the statute, since the document signed by the defendant incorporated so much of the deed as formed the consideration and promise. *Macrory v. Scott*, 907

STATUTE OF LIMITATIONS.

See AMENDMENT.
PROMISSORY NOTE.

(1). 21 *Jac.* 1, c. 16.

In March, 1832, the defendants B.

and C., who were then in partnership as solicitors, were employed by A. to lay out 500*l.* on mortgage. They lent the money to L. on the mortgage of certain premises, and retained possession of the mortgage-deed. The premises were afterwards sold subject to the mortgage, and the purchaser paid C. the 500*l.* and interest, but without the knowledge of B., and the deed was given up to the purchaser by C., but no receipt was indorsed thereon, nor was any reconveyance or receipt executed or signed by A., who was not informed that the money had been paid. In December, 1832, C., without the knowledge of B., returned to the purchaser 300*l.*, and received back the mortgage-deed, and no part of the 500*l.* was paid to A. Interest, at first on the 500*l.*, and then upon the 300*l.*, was paid to C. by the purchaser; and entries were made in the books of the defendants, giving credit to A. for interest on the 500*l.*, and debiting him with interest paid to his agent. In July, 1838, the defendants dissolved partnership. Up to the dissolution, interest on the 500*l.* was regularly paid to the agent of A. by C., by cheques drawn by the defendants on their bankers; and, after the dissolution, it was paid by C., sometimes in cash and sometimes by cheques on his own banker. In some of the receipts the money was described as interest upon a mortgage. A. died in May, 1840. In December, 1846, the purchaser paid to C. the 300*l.* and interest, and received from him the mortgage-deed. B. was ignorant of the receipts and payments subsequent to the investment of the 500*l.*, until 1849. In 1848, the plaintiffs, the executors of A., first discovered that the mortgage-money had been repaid: *Held*, that, under the above circumstances, the Statute of Limitations was a bar to the action; also, that no action would lie against B., inasmuch

as the subsequent receipt of the mortgage-money by C. was wholly unauthorised, and not within the scope of the partnership business. *Sims v. Brutton*, 802

(2). 2 & 3 Will. 4, c. 37.

A defendant in replevin avowed the taking of the goods for arrears of an ancient quit-rent issuing out of a tenement held of him as lord of a certain manor by fealty and 9*s.* rent. The plaintiff pleaded (*inter alia*) non tenuit. The last payment was made on the 25th of January, 1825, for rent due on the 11th of October, 1824. The distress was made on the 13th of May, 1845:—*Held*, (on error in the Exchequer Chamber, affirming the judgment of the Court of Exchequer), that, by the operation of the 2 & 3 Will. 4, c. 27, ss. 2, 3, and 34, the rent was extinguished by the lapse of twenty years from the day on which the last payment was made; and that the limitation need not be pleaded specially, but was available under the plea of non tenuit. *De Beauvoir v. Owen*, 166

STAYING PROCEEDINGS.

See PRACTICE, (6).

SUB-CONTRACTOR, (LIABILITY OF).

See MASTER AND SERVANT, (3).

SUBSTITUTED CONTRACT.

See CONTRACT.

SUGGESTION.

See COSTS, (2).

SURVEYOR.

See AGREEMENT.

TENANT IN COMMON.

See MONEY HAD AND RECEIVED, 1.

TOLL.

(1). *Turnpike Toll.*

An assignment of a mortgage of turnpike-tolls, according to the form prescribed by the 3 Geo. 4, c. 126, s. 81, has no validity unless produced and notified to the proper clerk or treasurer, and by him entered in the book kept for that purpose, within two months from its date.

The fact of the clerk having prepared or attested the execution of the transfer, is evidence from which a jury may infer a notification to him.

Where the trustees held meetings and had separate clerks at several places within their district—*Held*, that the clerk of the place in which the mortgage was made and entered was the proper clerk to receive the notification, although the mortgage included the tolls of the whole district, and the clerk was himself the mortgagee.

The trustees being indebted to their clerk in 81*l.* for business done as a solicitor, gave him a mortgage for 80*l.*, which recited the consideration to be money advanced by him to them:—*Held*, that the mortgage was valid under the 3 Geo. 4, c. 126, s. 81, the transaction being equivalent to money 'borrowed and taken up at interest' by the trustees. *Doe d. Owen Jones v. David Jones.* 16

(2). *Railway Toll.*

By the 5 & 6 Will. 4, c. cvii. the Great Western Railway Company were authorised to take certain toll for the conveyance of passengers and goods. By the 9 & 10 Vict. c. cccxxvii. and the 9 & 10 Vict. c. cccxxviii. which Acts received the Royal Assent on the 3rd August, 1846, a Company was incorporated, called The Birmingham

and Oxford Junction Railway Company, who were authorised to receive toll at a rate less than the scale of tolls on the Great Western Railway. Those Acts empowered the Great Western Railway Company to purchase the Birmingham and Oxford Junction Line, provided that no such purchase should take effect until the tolls of the Great Western Railway should have been reduced by Act of Parliament to the same scale as that of the Birmingham and Oxford Junction Railway. On the same 3rd of August, 1846, the Royal Assent was given to the 9 & 10 Vict. c. cccxv. whereby a Company was incorporated, called The Birmingham, Wolverhampton and Dudley Railway Company, who were authorised to receive the same tolls as the Birmingham and Oxford Junction Railway Company. By an agreement dated the 12th November, 1846, the Directors of the Birmingham and Oxford Railway Company, and the Directors of the Birmingham, Wolverhampton and Dudley Railway Company, agreed to sell to the Great Western Railway Company, and that Company agreed to purchase, the Birmingham and Oxford Junction Railway, and the Birmingham, Wolverhampton and Dudley Railway. Afterwards, 10 & 11 Vict. c. cxlix. passed, which empowered the Great Western Railway to purchase the Birmingham, Wolverhampton and Dudley Railway; and it was by that Act provided, that the Great Western Railway Company might demand for their own use, or of the Birmingham, Wolverhampton and Dudley Railway Company, a scale of toll, being materially less than that fixed by the 5 & 6 Will. 4, c. cvii. but not precisely the same as that authorised by the 9 & 10 Vict. c. cccxxvii. and 9 & 10 Vict. c. cccxxviii. By the 10 & 11 Vict. c. ccxxvi. which received the Royal Assent on the 22nd July, 1847, the Birmingham, Wolverhampton and Dudley Railway Company were again autho-

ried to sell their railway to the Great Western Railway Company, and it was enacted, that the reduced scale of tolls therein contained, and which is precisely the same as that contained in the 10 & 11 Vict. c. cxlix. should be deemed and taken to be the reduced scale referred to in the 9 & 10 Vict. c. cccxxvii.—*Held*, that, until the purchase of one or both of the lines was finally effected, the Great Western Railway Company were entitled to take the toll authorised by the 5 & 6 Will. 4, c. cvii.; but that, after the completion of either of the purchases, the scale of tolls to be taken by the Great Western Railway, as well on their original line as on the purchased line or lines, must be reduced to the scale fixed by the 10 & 11 Vict. c. cccxxvi. and 10 & 11 Vict. c. cxlix. *The Attorney-General v. The Great Western Railway Company*, 520

TOWN CLERK.

See BOROUGH RATE.

TRESPASS.

See MESNE PROFITS.

PLEADING, III. (2).

USE AND OCCUPATION, 2.

TRIAL AT BAR.

The Court will not, on the application of the plaintiff, grant a trial at bar merely because the defendant is Lord Chancellor and the plaintiff an attorney of the Court. *Dimes v. Lord Cottenham*, 311

TROVER.

See ESTOPPEL.

EVIDENCE, (2).

TRUSTEE.

See GRAMMAR SCHOOL.

TOLL, (1).

TUNNEL.

See CONTRACT.

USE AND OCCUPATION.

When Maintainable.

1. An action for use and occupation, under the stat. 11 Geo. 2, c. 19, s. 14, does not lie where there has not been an actual entry by the lessee. *Low v. Ross*, 553

2. Trespass will not lie against the occupier of land, at the suit of the mortgagee, who has never been in actual possession or been seised of the land, and has not obtained a judgment in ejectment, either by default or by verdict; and therefore he cannot, in such case, waive the tort, and maintain an action of use and occupation. *Turner v. Cameron's Coalbrook Steam Coal Company*, 932

USURY.

To a declaration for work and labour, commission, money lent, and interest, the defendant pleaded, that it was corruptly, and against the form of the statute, agreed between the plaintiff and the defendant, that the plaintiff should, from time to time, as the defendant should require, lend him sums not exceeding 1000*l.*, by cashing the defendant's cheques; and that, for the forbearance, the defendant should pay the plaintiff certain sums, partly under the name of interest, and partly under the shift and cheivance of commission, at the rate of 10*l.* per cent. The plea then averred, that the plaintiff did cash the defendant's cheques, and that the usurious interest was so charged:—*Held*, on special demurrer, that the plea was good, although it did not state how much of the excess beyond 5*l.* per cent. was for usurious interest, and how much for commission, it appearing that the agreement for the gross sum to be paid for interest and commis-

sion was done colourably, so as to enable the plaintiff to get more than 5*l.* per cent.

In pleading usury, the defendant need only bring the transaction within the 12 Anne, stat. 2, c. 16; and if the plaintiff relies upon the 2 & 3 Vict. c. 37, as exempting the case from the operation of the statute of Anne, that should come by way of replication.
Derry v. Toll, 741

VENDOR AND PURCHASER.

See DAMAGES.

PLEADING, I. (2).

VENUE.

See PRACTICE, 1.

WARRANT.

See BOROUGH RATE.

WARRANTY.

1. The plaintiff, who resided in Ireland, having applied to the defendants, emigration agents in London, respecting a passage for himself and family on board their ships to Australia, received in answer a letter in which they agreed to convey him and his family for 65*l.* This letter was written on the fly-sheet of a printed circular, headed "Emigration to Australia," and which (inter alia) stated that ships "will be despatched on the appointed days (wind and weather permitting), for which written guarantees will be given." Then followed a list of ships, amongst which the "Asiatic" was named as to sail from London on the 15th of August, and from Plymouth on the 25th. In another part of the circular it was stated,—"Passengers from Ireland can readily join at Plymouth. A deposit of one-half the passage-money to be paid at the time the berths are engaged, the balance to be paid prior to granting the embarkation order." The

plaintiff engaged a berth on board the "Asiatic," and paid the defendants 32*l.* 10*s.* as a deposit, but no written guarantee was given. The "Asiatic" did not arrive at Plymouth until the 3rd of September, although not prevented by wind or weather. The plaintiff's berth was kept vacant from London to Plymouth:—*Held*, that the statement in the circular was not a mere representation, but a warranty that the "Asiatic" would sail on the days appointed, and that, as she did not, the plaintiff was justified in taking a passage on board another vessel, and was entitled to recover from the defendants the amount of the deposit, and the expenses he had been put to by the delay at Plymouth. *Crandon v. Marshall*, 395

2. The defendant, being the owner of a ship, advertised its sale, describing it as "The fine teak-built barque 'Intrepid,' A. 1, and well adapted for a passenger ship." The plaintiff, having read the advertisement, negotiated for its purchase, and a contract was signed by the plaintiff and defendant, whereby the former agreed to buy and the latter to sell "the barque 'Intrepid,' as she now lies in the St. Katherine Dock, agreeable to the inventory annexed." The inventory commenced by describing the ship in the same terms as the advertisement: under that was the word "Inventory," which was followed by a list of the ship's stores and tackle; and in the margin, opposite to this list, the defendant signed his name. The document concluded thus:—"The vessel and her stores to be taken with all faults as they now lie, without any allowance for deficiency in length, weight, quantity, quality, or any defect or error whatever." The vessel proved not to be teak-built, nor of class A. 1, nor adapted for a passenger-ship:—*Held*, first, that the whole of the above document was incorporated with the contract of sale, and not merely the

1032. WINDING-UP ACT.

list of stores headed "Inventory." Secondly, that there was no warranty of the vessel. *Taylor v. Bullen*, 779

WEIGHTS AND MEASURES ACT, 5 & 6 WILL. 4, c. 63.

See MEASURES.

WILL.

See DEVISE.
PLEADING, II. (2).
POWER.

WINDING-UP ACT, 11 & 12 VICT. c. 45.

See EVIDENCE, (6), 2.

1. The defendant, a director and shareholder in a Joint-stock Company, together with three others, made the following promissory note:—"We, the Directors of the Royal Bank of Australia, for ourselves and the other shareholders of this Company, jointly and severally promise to pay to H. W., or bearer, on &c., the sum of &c., for value received on account of the Company." Signed "A. B., C. D., E. F., Directors." The defendant having been sued thereon in his individual character:—*Held*, that the case did not fall within the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45, s. 73; and that there was no ground for staying the action until the plaintiff should have proved his debt before the Master appointed to wind up the affairs of the Company. *Penkivil v. Connell*, 381

2. A creditor who has sued a contributory to and shareholder in a Joint-stock Company, and has had his action stayed under the 73rd section of the Joint-stock Companies Winding-up Act, 11 & 12 Vict. c. 45,

WRIT OF SUMMONS.

until after the plaintiff shall have made or exhibited proof of his debt or demand before the Master in Chancery, may, upon the allowance of such proof by the Master, and without any further step, proceed with his action. *Prescott v. Hadow*, 726

WITNESS.

See EVIDENCE, (5).

A witness, who, in obedience to a subpoena, attends a trial in a civil action, may, without any express contract, maintain an action for his expenses against the party who subpoenaed him, the fact of his attendance being evidence from which the jury may infer a contract. *Pell v. Daubeny*, 955

WRIT OF SUMMONS.

See AMENDMENT.

Service on Railway Company.

By the 8 & 9 Vict. c. clxii. incorporating the Caledonian Railway Company, six miles of which are in England and the rest in Scotland, the Companies Clauses Consolidation Act, 8 & 9 Vict. c. 16, is incorporated with the Company's Act, so far as is necessary for carrying into effect the English portion of the line. The principal office of the Company was in Scotland, and they had no office out of Scotland, except a station at Carlisle, used only for receiving passengers and goods. The plaintiff having a claim in debt against the Company, in respect of their amalgamation with another Scotch Railway:—*Held*, that service of the writ of summons on the secretary of the Company while attending a meeting in London, was good service. *Wilson v. The Caledonian Railway Company*, 822

END OF VOL. V.

Stanford Law Library



3 6105 062 791 327



